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No. 07-1

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

CITY OF SEATTLE, EXECUTIVE SERVICES DEPARTMENT,

Respondent.

FORD MOTOR COMPANY,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

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PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the closely–divided Washington Supreme Court erred in concluding—contrary to the Supreme Courts of Pennsylvania and Virginia—that the dormant Commerce Clause does not bar a city from imposing a business activities tax on 100 percent of a taxpayer's gross receipts derived from activities carried on in part within the city and in part in other States.

PARTIES TO THE PROCEEDINGS

The parties are as stated in the caption.

RULE 29.6 STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Ford Motor Company ("Ford") respectfully petitions this Court to grant a writ of certiorari to review the judgment of the Supreme Court of Washington in these consolidated cases.

OPINIONS BELOW

The opinion of the Supreme Court of Washington (App. 1a–40a) is reported at 160 Wn.2d 32, 156 P.3d 185. The order of the King County Superior Court in the Seattle case (App. 43a–46a) is

not officially reported. The opinion of the Pierce County Superior Court in the Tacoma case (App. 47a–58a) is not officially reported. The order of the Supreme Court of Washington denying Ford's motion for reconsideration (App. 41a–42a) is not officially reported.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on April 12, 2007. The Supreme Court of Washington denied Ford's motion for reconsideration on August 6, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Relevant portions of the Seattle and Tacoma municipal codes are set forth at App. 59a–60a.

STATEMENT

This case raises the fundamental question whether the dormant Commerce Clause prohibits a city from imposing a business activities tax on 100 percent of the gross receipts from activities carried on in part within the city and in part in other States.

The Washington Supreme Court was sharply divided on this question, but answered it in the negative, despite this Court's admonition that a business activities tax on gross receipts is "simply a variety of a tax on income, which [is] required to be apportioned to reflect the location of the various interstate activities by which it was earned." *Oklahoma Tax Commission* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 190 (1995). The court below thus held that the Cities of Seattle and Tacoma could tax Ford's *entire* gross receipts from its wholesale sales of vehicles to dealers located in those cities, even though, as the dissent explained and the majority did not dispute, "Ford's wholesaling activities were not conducted wholly within Washington: its vehicles were sold in Michigan – title, ownership, and possession are transferred when Ford delivers the vehicles to a common carrier at its factory in Michigan." App. 38a.

In contrast to the court below, the Supreme Courts of Pennsylvania and Virginia have read *Jefferson Lines* as precluding a city from imposing a business activities tax on 100 percent of the gross receipts generated by interstate business activities when some of those activities occur outside the city in other States. *Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004); *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003); *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996); *accord, Southern Pacific Transportation Co. v. Arizona*, 44 P.3d 1006 (Ariz. App. 2002). The decision below has ignored this Court's Commerce Clause doctrine and, as a result,

has precipitated a conflict with the decisions of other state courts of last resort.

1. The Cities' Business Activities Taxes

The Cities of Seattle and Tacoma ("the Cities") each impose a business activities tax[1] on the "privilege of engaging in business activities" within their respective Cities. Seattle Municipal Code (SMC) 5.45.050; Tacoma Municipal Code (TMC) 6.68.220.[2] Among the business activities taxed by both Cities is "the business of making sales . . . at wholesale." SMC 5.45.050(C); TMC 6.68.220(B). For any taxpayer engaged in the business of wholesaling within the Cities, the tax is measured by the gross receipts from wholesale sales of goods to buyers located in the Cities, regardless of where the actual sales at wholesale occur. App. 59a; App.60a; ("it does not matter in which jurisdiction the actual sales at wholesale occur"; App. 9a). The tax rate is 0.215% of gross receipts in Seattle and 0.102% in Tacoma. App. 59a; App. 60a.

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[1] The petition employs the term "business activities tax" to refer to those taxes that are imposed on the privilege of engaging in business activity in a taxing jurisdiction and are measured by the gross receipts from such activity, whether denominated a "business and occupation" tax (as were the taxes in Seattle and Tacoma), a "business privilege" tax, or a "business gross receipts" tax.

[2] All references are to the Cities' municipal codes in force during the tax years at issue. The Seattle code was amended during the audit period, but the revisions did not impact the court's analysis, App. 5a n.1. The petition follows the decision below in referring to the amended version of the Seattle code.

2. Ford's Business

There is no dispute about the material facts.[3] Ford is a Delaware corporation with its principal place of business in Dearborn, Michigan. Ford manufactures and sells vehicles throughout the United States and in many foreign countries. Ford makes wholesale sales of vehicles, parts, and accessories to independent dealers throughout the United States (including in the Cities of Seattle and Tacoma). These dealers in turn make retail sales of Ford products to individual consumers.

Ford's wholesaling activities that ultimately result in the receipt of a vehicle by a Seattle or Tacoma dealer include an eight–stage "order flow process," most of which occurs outside of the Cities and the State of Washington. App. 101a–109a. Ford's wholesaling activities within the Cities include advertising, meetings with dealers, and imparting information about new products.[4] Other wholesaling activities—including sales forecasting,

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[3] The facts were largely stipulated in the Tacoma case. App. 97a–112a. These facts are also reflected in the undisputed affidavits that Ford filed in opposition to Seattle's motion for summary judgment in the Seattle case. See App. 44a (listing Ford's affidavits). Indeed, in its brief to the court below, the City of Seattle recognized that "[t]here are no material facts in dispute." Br. City of Seattle 8, *Ford Motor Co. v. City of Seattle*, No. 77516–8, Wash. Sup. Ct., Feb. 1, 2006.

[4] Ford acknowledges that the limited wholesaling activities in which it engages in the Cities are sufficient to establish a taxable presence that permits the Cities to impose a business activities tax on *some portion*, but not 100 percent, of the gross receipts generated by its multi-state wholesaling activities that result in sales to dealers located in the Cities. App. 73a, 93a.

dealer allocation, review of dealer commitments, and scheduling—occur in Dearborn, Michigan. App. 103a–104a. Dealer invoices and Certificates of Origin for vehicles destined for Seattle and Tacoma are prepared in Troy, Michigan. App. 111a–112a. The transfer of title, ownership, and possession of the vehicle from Ford to the dealer takes place when Ford transfers the assembled vehicle to a common carrier at one of its vehicle assembly plants in Georgia, Illinois, Kentucky, Michigan, Missouri, Ohio, New Jersey, and Virginia. App. 109a. The final step in the wholesaling process is shipment of the vehicle by the carrier to the dealer in Seattle or Tacoma. App. 109a–110a.

3. The Tax Assessments and Refund Claims

The City of Seattle audited Ford for the period January 1998 through December 2002. It assessed a tax against 100 percent of Ford's gross receipts from wholesaling activities associated with sales of vehicles to dealers located in Seattle. The assessment amounted to roughly $400,000. App. 63a. The City of Tacoma audited Ford for the period January 1990 through December 2002. It assessed a tax against 100 percent of Ford's gross receipts from wholesaling activities associated with sales of vehicles to dealers located in Tacoma. That assessment amounted to roughly $1,300,000, including interest and penalties. App. 83a. After paying both assessments, Ford filed suit in King County Superior Court seeking a refund of the Seattle tax and in Pierce County Superior Court seeking a refund of the Tacoma tax. App. 61a–79a, App. 80a– 96a.

4. The Proceedings Below

In both the King County Superior Court (Seattle) and the Pierce County Superior Court (Tacoma), Ford challenged the validity of the assessment on various state and federal grounds, including the Commerce Clause claim that each City's business activities tax unduly burdens interstate commerce by failing to fairly apportion the tax to Ford's activities condu ted within the City. Seattle Complaint ¶ 56 (App. 74a); Tacoma Complaint ¶ 70 (App. 93a). Both trial courts ruled against Ford. App. 43a–46a; App. 47a–58a. Because "both cases presented issues of substantial public importance," App. 4a, the Washington Supreme Court granted direct review and consolidated the appeals.

By a 5–4 majority, the Washington Supreme Court rejected Ford's Commerce Clause claim. The majority relied principally on this Court's decision in *Tyler Pipe Industries, Inc.* v. *Washington Department of Revenue*, 483 U.S. 232 (1987). In *Tyler Pipe*, this Court rejected an argument that a taxpayer's out–of–state manufacturing activities mandated apportionment of Washington State's business activities tax on gross receipts derived from making sales at wholesale in the State. This Court held that because manufacturing and wholesaling were separate business activities, it was not necessary to apportion the taxpayer's gross receipts from wholesaling to reflect its out–of–state manufacturing activities. *Id.* at 251.

Although it is undisputed in this case that much of Ford's wholesaling activity actually occurred

outside the Cities and Washington State, App. 101a–112a, the majority below nevertheless concluded that wholesaling is "an activity separate from manufacturing, design, and the like, which under *Tyler Pipe* must be considered conducted entirely within the destination city." App 19a–20a. The majority expressly disagreed with the cases from other state courts requiring the apportionment of business activities taxes on gross receipts. It found "none of these cases persuasive" (App. 20a), either because they did not involve *interstate* commerce or because they purportedly recognized that "'the state of destination can tax selling activity,' without requiring apportionment." App. 21a (quoting *Philadelphia Eagles*, 823 A.2d at 129). The majority failed to note that the Pennsylvania Supreme Court's comment in the *Philadelphia Eagles* case was simply describing the historical analogy that this Court once had drawn between sales taxes and business activities taxes—an analogy, the Pennsylvania court accurately observed, from which "the Supreme Court has distanced itself." *Philadelphia Eagles*, 823 A.2d at 130.

In any event, the majority below found no need to pursue the question of how this Court's decision in *Jefferson Lines* might affect proper analysis of the fair apportionment question because the Washington court had "previously rejected the argument that *Jefferson Lines* somehow required us to revisit and overturn *Tyler Pipe's* holding." App. 21a.

The four–member dissent below concluded that the Cities' taxation of 100 percent of Ford's gross receipts from its interstate wholesaling

activities violated the Commerce Clause's fair apportionment requirement: "Clearly, Ford's wholesaling activities were not conducted wholly within Washington: its vehicles were sold in Michigan—title, ownership, and possession are transferred when Ford delivers the vehicles to a common carrier at its factory in Michigan." App. 38a. The dissent distinguished *Tyler Pipe* because "unlike Ford, Tyler Pipe sold its products in Washington." *Id.* Moreover, the dissent noted, "the cities' tax on sales made in Michigan also burdens interstate commerce because of the threat of double taxation." *Id.* Tracking this Court's reasoning in *Jefferson Lines*, the dissent pointed out that "[t]he Supreme Court has said that there is a risk of double taxation 'whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed." *Id.* (quoting *Jefferson Lines*, 514 U.S. at 184).

REASONS FOR GRANTING THE PETITION

The 5–4 decision of the Washington Supreme Court warrants review for two compelling reasons. First, the decision below has created a clear conflict with decisions of other state courts of last resort over the important question whether the dormant Commerce Clause bars a city from imposing a business activities tax on 100 percent of a taxpayer's gross receipts derived from activities carried on in part within the city and in part in other States. The answer to that question turns on whether this Court's declaration in *Jefferson Lines*—that a business activities tax on gross receipts tax is "simply a variety of a tax on income, which [is] required to be apportioned to reflect the location of

the various interstate activities by which it was earned" (514 U.S. at 190)—means what it says. Most state courts have concluded that it does; the decision below concluded that it does not.

Second, the question whether a business activities tax on gross receipts must be "apportioned to reflect the location of the various interstate activities by which it was earned" is one of great and growing national significance. With nearly 1,200 local jurisdictions and an increasing number of States relying on business activities taxes on gross receipts as a major source of revenue, litigation over the proper apportionment of such levies has increased dramatically in recent years. This Court's intervention is required to assure that multistate enterprises are not subject to "act[s] of overreaching" by States and localities (*Jefferson Lines*, 514 U.S. at 184), with the consequent risks of multiple and extraterritorial taxation that undermine the national common market the Commerce Clause was designed to protect.

I. THIS COURT SHOULD RESOLVE THE CLEAR CONFLICT BETWEEN STATE COURTS OF LAST RESORT OVER WHETHER A CITY MAY TAX 100 PERCENT OF THE GROSS RECEIPTS FROM BUSINESS ACTIVITY CARRIED ON IN PART IN OTHER STATES.

In holding that Seattle and Tacoma may impose a business activities tax on the unapportioned gross receipts from activities that are conducted only in part within the Cities and in substantial part in other States, the Washington

Supreme Court has created a clear conflict with decisions of other state courts of last resort on an important federal question. The decision below unequivocally holds that it is of no constitutional moment that the activities generating the gross receipts that Seattle and Tacoma seek to tax—namely, "engaging . . . in the business of making sales . . . at wholesale"—occurred primarily outside the Cities and Washington State: "The fact that some portions of the wholesaling process take place outside of the taxing jurisdiction is not controlling and does not . . . require the Cities to exclude such activities from the tax measure." App. 24a. This holding is irreconcilable with the holdings of the Supreme Courts of Pennsylvania and Virginia, and with other state courts as well.

Two Pennsylvania Supreme Court decisions squarely hold that a city may not apply its business activities tax to the unapportioned gross receipts from activities that are conducted only in part within the city and in substantial part in other taxing jurisdictions. In *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003), the Pennsylvania Supreme Court considered the application of Philadelphia's business activities tax that is imposed on the gross receipts of "every person engaging in any business in the City of Philadelphia." *Id.* at 113. The City of Philadelphia, like the Cities of Seattle and Tacoma, sought to impose its tax on the unapportioned gross receipts that the taxpayer derived from activities carried on only partly within the city, namely, the Eagles' share of National Football League receipts attributable to the television broadcast of the Eagles' games, only half of which were played in Philadelphia.

The Pennsylvania court first addressed and flatly rejected the city's position—like the position of the majority below—that apportionment was unnecessary because the business activities tax, "as a gross receipts tax upon the privilege of doing business, is exempt from the Commerce Clause apportionment requirement." *Id.* at 129. The court observed that "the Supreme Court made clear in *Oklahoma Tax Commission v. Jefferson Lines* that a gross receipts tax is 'simply a *variety of a tax on income which [is] required to be apportioned* to reflect the location of various activities by which it [is] earned.'" *Id.* at 130 (quoting *Jefferson Lines*, emphasis and brackets supplied by the Pennsylvania court).

The court then considered whether the Philadelphia tax satisfied the fair apportionment requirement. It concluded that "[t]he City's levy on 100% of the Football Club's media receipts, when half of the Eagles Team's football games were telecast from NFL venues outside of Philadelphia, was inherently arbitrary and had no rational relationship to the Football Club's business activity that occurred *in Philadelphia*." *Id.* at 132 (emphasis in original). The court further observed that "by reaching beyond its borders and taxing receipts from the Football Club's business activities in other jurisdictions, the City clearly put the Football Club at risk of being subjected to multiple taxation." *Id.* at 132–33.

The Pennsylvania Supreme Court reached a similar result in *Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004). There, the court invalidated a township's

business activities tax measured by the taxpayer's unapportioned gross receipts from activities carried on only in part in the township. It held that "the Township is plainly taxing more than that 'portion of the revenues from [Northwood's] interstate activities which reflect the in-state activities being taxed,' as it is taxing *all* of the revenues from Northwood's interstate activities." *Id.* at 805 (emphasis and brackets in original, citation omitted, quoting *Goldberg* v. *Sweet*, 488 U.S. 252, 262 (1988).) Consequently, the township's tax violated the Commerce Clause because it "'reach[ed] beyond that portion of value that is fairly attributable to economic activity within the taxing State . . . .'" *Id.* (quoting *Jefferson Lines*, 514 U.S. at 185).

Relying on *Jefferson Lines*, the Virginia Supreme Court has likewise held, contrary to the decision below, that the Commerce Clause prohibited a city from applying its business activities tax to 100 percent of a taxpayer's gross receipts from interstate activities, when only a portion of those activities occurred within the city. In *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996), a manufacturing corporation headquartered in the city operated manufacturing, storage, and distribution facilities throughout the United States. The city sought to apply its business activities tax to 100 percent of the taxpayer's gross receipts on the theory that "all of the taxpayer's gross receipts are in some way attributable to the headquarters office . . .." *Id.* at 498. In holding that such an assessment violated the Commerce Clause's fair apportionment requirement, the court declared:

> By definition, assessments based on 100% of American Woodmark's revenues included revenues realized from value produced in locations other than in the taxing jurisdiction. Given the number of facilities and operations outside of Winchester, it is equally axiomatic that the value added to the product by the Winchester operations could not possibly produce 100% of the revenues.

Id.

Other state courts have likewise read this Court's opinion in *Jefferson Lines* as articulating a dormant Commerce Clause principle requiring the apportionment of business activities taxes on gross receipts from interstate activities to reflect only the local revenue–generating portion of the activities. *See, e.g., Southern Pacific Transportation Co. v. Arizona*, 44 P.3d 1006, 1014 (Ariz. App. 2002) (observing that "*Jefferson Lines* compels the view that gross receipts taxes . . . must be apportioned to comply with the dormant Commerce Clause" and invalidating an unapportioned tax on a railroad's gross receipts from transporting copper concentrate from one point to another in the State, when a portion of the journey occurred outside the State); *General Motors Corp. v. City & County of Denver*, 990 P.2d 59, 71 (Colo. 1999) ("In the context of income taxes or taxes on gross receipts, apportionment *must* take into account the location where revenue is generated" (emphasis in original, citing *Jefferson Lines*)).

The majority below attempted to distinguish only one of the foregoing state court decisions. Asserting that the Pennsylvania Supreme Court's decision in *Philadelphia Eagles* "actually contradicts Ford's argument" that business activities taxes must be apportioned, the court elaborated:

> While the Pennsylvania Supreme Court did limit the reach of Philadelphia's business privilege tax on *services* to receipts from services performed in the city, it recognized and emphasized that in levying a gross receipts tax on activities involving *manufacturing and sales*, "the state of origin can tax the manufacturing activity, and the state of destination can tax the selling activity," without requiring apportionment.

App. 20a–21a (emphasis in original). As previously noted, however, the majority below completely ignored the fact that the Pennsylvania court's comment on the purported right of a destination State to tax selling activity without apportionment was simply a description of the analogy that this Court once had drawn between sales taxes and business activities taxes—an analogy from which "the Supreme Court has distanced itself." *Philadelphia Eagles*, 823 A.2d at 130.

Indeed, it is the rejection of that very analogy in *Jefferson Lines*—a rejection recognized and relied upon by other state courts in requiring the apportionment of business activities taxes on gross receipts—that lies at the heart of the conflicting state court decisions on the question here presented.

In *Jefferson Lines*, this Court considered whether Oklahoma could impose a sales tax on the gross receipts derived from the sale of bus tickets to individual passengers for interstate transportation. The taxpayer contended that the tax violated the Commerce Clause's fair apportionment requirement because it was measured by the full purchase price of the bus ticket, even though a portion of the price was attributable to transportation services to be rendered in other States. In particular, the taxpayer argued that Oklahoma's sales tax was indistinguishable from the business activities tax at issue in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653 (1948). In that case, this Court invalidated a business activities tax on the unapportioned gross receipts derived by an interstate bus company from tickets sold in New York, because the receipts reflected payment for transportation services to be performed partially in other States.

This Court in *Jefferson Lines* sustained Oklahoma's sales tax on the full purchase price of the interstate bus ticket. In so doing, the Court drew a sharp distinction between *sales* taxes, which are *transaction* taxes *imposed on the buyer* and on a particular event (namely, a sale) that takes place at one location and at one point in time, and *business activities* taxes, which are *imposed on the seller* and are directed to business *operations* (or a category of operations, *e.g.*, wholesaling) that can take place in multiple jurisdictions over a period of time and which thereby create a risk of both extraterritorial and multiple taxation.

As this Court explained in *Jefferson Lines*, there is a critical difference between these two types of levies in terms of the Commerce Clause's fair apportionment requirement and the risk of extraterritorial and multiple taxation that fair apportionment is designed to prevent. Alluding to its long-standing treatment of sales taxes on goods, this Court observed that "[a] sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale . . . ." *Jefferson Lines*, 514 U.S. at 186. Because the sale of goods "has been found properly to be treated as unique," *id.* at 188, a "conventional sales tax has long been held to be externally consistent," *id.*, *i.e.*, not to involve extraterritorial "overreaching." *Id.* at 185. Moreover, a sales tax creates no risk of multiple taxation because "the very conception of the common sales tax on goods, operating on the transfer of ownership and possession at a particular time and place, insulated the buyer from any threat of further taxation of the transaction." *Id.* at 187.

In *Jefferson Lines*, this Court simply extended its "sales tax on goods" analysis to a sales tax on services, some portion of which would be rendered in other States. This Court declared that "[a] sale of services can ordinarily be treated as a local state event just as readily as a sale of tangible goods can be located solely within the State of delivery." *Id.* at 188. Beyond the lack of any "impermissible overreaching" (*id.* at 185) in a territorial sense, there was no risk of multiple taxation because "[t]he taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination." *Id.* at 190.

By contrast, when this Court turned its attention from a *sales tax* imposed *on the buyer* and on a particular *transaction* to a *business activities tax* imposed *on the seller* and on a set of *activities*, it reaffirmed the basic Commerce Clause rule, reflected in cases like *Central Greyhound*, that such levies must be apportioned to reflect the local activities that the State may legitimately tax. In repudiating the taxpayer's effort in *Jefferson Lines* to justify apportionment in a sales tax context by analogizing Oklahoma's sales tax to the business activities tax involved in *Central Greyhound*, this Court stated flatly that "*Central Greyhound* provides the *wrong* analogy" for resolving the question before it. *Id.* (Emphasis supplied.)

While recognizing that both levies involved a tax measured by receipts from the same interstate bus services and that apportionment was feasible in both cases, this Court continued with a passage over which state court decisions are in conflict:

> But the two diverge crucially in the identity of the taxpayers *and the consequent opportunities that are understood to exist for multiple taxation of the same taxpayer. Central Greyhound* did not rest simply on the mathematical and administrative feasibility of a mileage apportionment, but on the Court's express understanding that the *seller – taxpayer* was exposed to taxation by New Jersey and Pennsylvania on portions of the same receipts that New York was taxing in their entirety. The

> Court thus understood the gross receipts tax to be simply a variety of tax on income, which was required to be apportioned to reflect the location of the various interstate activities by which it was earned.

Id. (emphasis supplied).

Fidelity to the distinction that led this Court to approve an unapportioned sales tax in *Jefferson Lines*, while reaffirming its rejection of an unapportioned business activities tax in *Central Greyhound*, requires fair apportionment here. If Seattle and Tacoma had imposed a sales tax on a dealer's purchase of a Ford vehicle, there would have been no right to an apportionment of the sales price for the reasons this Court set forth in *Jefferson Lines*—namely, that a sales tax is a transaction tax that "falls on the buyer" (*id.*) and on a unique "taxable event." *Id.* (In fact, both Seattle and Tacoma impose a sales tax on sales by dealers to customers. SCM 5.60.010; TCM 6A.70.010.) But, as the decision below made clear, the Seattle and Tacoma taxes here involved are *not* sales taxes.

> A tax imposed on the actual sale of products is, by definition, a sales tax. B & O[5] taxes, on the other hand, are not sales taxes. The Cities' municipal codes plainly tell us that their B & O taxes are imposed on "the act or

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[5] The Cities' business activities taxes were denominated "business and occupation" or "B & O" taxes. See note 1 *supra*. See also p. 4 *supra* (describing the Cities' taxes).

> privilege of engaging in business activities within the City." Therefore, the plain meaning of the statutes at issue is that the taxable incident . . . is "*engaging* within the City *in the business of* making sales . . . at wholesale," not merely "making sales at wholesale."

App. 8a (citation omitted, emphasis added by the court below, second ellipsis in original). There can therefore be no dispute that the Seattle and Tacoma taxes at issue here fall squarely within the category of business activities taxes (as distinguished from sales taxes) that, like the tax at issue in *Central Greyhound*, must be apportioned to reflect the local activities generating the gross receipts that may properly be subjected to tax.

In rejecting that proposition, the majority below relied primarily on this Court's decision in *Tyler Pipe*. That case rebuffed a fair apportionment challenge to Washington's state–level business activities tax imposed on an out–of–state manufacturer's unapportioned gross receipts derived from making wholesale sales in the State. The majority below summarily dismissed "the argument that *Jefferson Lines* somehow required us to revisit . . . *Tyler Pipe*'s holding." App. 21a.[6] But the majority's reliance on *Tyler Pipe* is misplaced.

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[6] The court noted that it had "previously rejected" that argument, App. 21a, referring to an equally summary dismissal of a fair apportionment challenge to Washington's business activities tax based on *Jefferson Lines*. *W.R. Grace & Co. v.*

In *Tyler Pipe*, substantially all of the taxpayer's wholesaling activities took place within the State. The taxpayer argued that the gross receipts from its sales at wholesale should be apportioned to reflect the fact that the goods it sold were manufactured out–of–state. This Court rejected the taxpayer's argument because it was based on the "erroneous assumption" that Washington was taxing gross receipts from "the unitary activity of manufacturing and wholesaling." 483 U.S. at 251. This Court concluded that "the activity of wholesaling—whether by an in–state or an out–of–state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Id.* It is thus clear that this Court's sole focus in *Tyler Pipe* was on the relationship between the activity of "manufacturing" and the activity of "wholesaling." Because each was considered a separate and distinct activity that could be the proper subject of a business activities tax, there was no justification for apportioning the receipts derived from wholesaling to take account of manufacturing done elsewhere.

Here, by contrast, the sole focus is on the activity of wholesaling and wholesaling alone, not on wholesaling versus manufacturing. Ford makes no claim that its out–of–state *manufacturing* activities justify apportionment. Rather, Ford's position is that its substantial out–of–state *wholesaling* activities, including the transfer of title, ownership, and possession of vehicles to dealers at its various

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Department of Revenue, 973 P.2d 1011 (Wash.), *cert. denied*, 528 U.S. 950 (1999).

out–of–state assembly plants, are what require apportionment here. No such argument was considered by this Court in *Tyler Pipe*.

In short, the majority's holding below—that "[t]he fact that some portions of the wholesaling process take place outside of the taxing jurisdiction is not controlling and does not . . . require the Cities to exclude such activities from the tax measure"—is not supported by this Court's decision in *Tyler Pipe* because that case simply did not address the apportionment issue raised here. Indeed, the holding below flies in the face of this Court's admonition in *Trinova Corp.* v. *Michigan Department of Treasury*, 498 U.S. 358 (1991), that "labeling . . . a tax on 'business activity'" does not permit a court to "forgo examination of the actual tax base and apportionment." *Id.* at 374 ("'[a] tax on sleeping measured by the number of pairs of shoes in your closet is a tax on shoes.'" *Id.* (citation omitted)).

Moreover, to the extent *Tyler Pipe* is thought to stand for the proposition that wholesaling activities result in local sales transactions that are properly taxable in full where the sales take place, then Ford, unlike Tyler Pipe, would clearly be subject to multiple taxation because the transfer of title, ownership, and possession of its vehicles takes place in other taxing jurisdictions outside Washington State and there would be nothing to prevent those jurisdictions from claiming that the sales at wholesale actually take place there.

At a minimum, as other state court decisions considering similar Commerce Clause challenges have recognized, *Jefferson Lines* requires a

reevaluation of many of this Court's earlier decisions that may be read as sanctioning business activities taxes measured by the unapportioned gross receipts from activities carried on both within and without the taxing jurisdiction. *See Philadelphia Eagles*, 823 A.2d at 130; *Southern Pacific*, 44 P.3d at 1014. This Court's guidance is now required to determine which state courts are correctly reading *Jefferson Lines*.

II. THE FAIR APPORTIONMENT ISSUES RAISED BY THE PROLIFERATION OF STATE AND LOCAL BUSINESS ACTIVITIES TAXES ARE A SOURCE OF GREAT NATIONAL CONCERN.

The fair apportionment issues raised by the decision below are symptoms of a problem of great and growing national significance. Today, nearly 1,200 counties, cities, towns, and other state political subdivisions impose business activities taxes on gross receipts derived from operations carried on within their localities.[7] Among those localities are the Cities of Atlanta, Birmingham, Kansas City, Los Angeles, Oakland, Philadelphia, Pittsburgh, St. Louis, and, of course, Seattle and Tacoma.[8] Moreover, such taxes exist at the state level as well,[9]

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[7] *See* Ernst & Young, E tax Alert, Quantitative Economics and Statistics; State and Local Taxation (March 7, 2007) available through http://www.ey.com/global/content.nsf/US/Tax_-_Quantitative_Economics_and_Statistics_-_Overview.

[8] *Id.*

[9] Several States, like Washington, have employed gross receipts taxes for many years. Wash. Rev. Code § 82.04.220, *et seq.*. *See also* Del. Code Ann. tit. 30, § 2902; Haw. Rev. Stat. § 237-13.

with Kentucky, Michigan, and Ohio having adopted state–level business activities taxes, measured in whole or in part by gross receipts, in just the last two years.[10] *See* John L. Mikesell, *State Gross Receipts Taxes and Fundamental Principles of Tax Policy*, State Tax Notes, March 5, 2007, p. 615.

Business activities taxes imposed on gross receipts have spawned considerable litigation as to whether they satisfy the Commerce Clause's fair apportionment requirement. The results can at best be described as confusing and inconsistent. *See generally* Kelly W. Smith & John M. Allan, *Commerce Clause Implications of Locally Imposed Gross Receipts Based Taxes*, 8 State & Local Tax Lawyer 33 (2003). In addition to the conflicting decisions described earlier in this petition, other state courts have issued similarly conflicting decisions over the question whether the Commerce Clause requires apportionment of business activities taxes on gross receipts to reflect activities carried on within and without the taxing jurisdiction.[11] Indeed,

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[10] Ky. Rev. Stat. Ann. § 141.0401; Mich. Comp. Laws. § 208.1203; Ohio Rev. Code Ann. 5751.02. These levies vary in their detail, but all contain gross receipts tax measures as at least one component of the tax base.

[11] Thus, some state courts have held that the Commerce Clause requires such apportionment. *See, e.g., M & Associates, Inc. v. City of Irondale*, 723 So. 2d 592 (Ala. 1998) (Commerce Clause bars city from applying business activities tax to unapportioned gross receipts from a business's sales made from its facilities both inside and outside the city limits); *Ford Motor Co. v. City of Hazelwood*, No. 02CC–002296 (St. Louis Cty. Cir. Ct., Mo. Aug. 26, 2003) (Commerce Clause bars city from applying business activities tax to unapportioned gross receipts from vehicles assembled in city); *KMS Fin. Servs. Inc. v. City of Seattle*, 134 Wash. App. 1067 (2006) (Commerce Clause bars

in anticipation of yet further litigation of this genre, the Ohio Legislature adopted a special appeals process for constitutional challenges to its recently enacted business activities tax on gross receipts. Ohio Rev. Code Ann. § 5751.31.

In short, the questions presented by the Washington Supreme Court's decision concerning the Seattle and Tacoma business activities taxes reflect a problem of increasing national concern on which the state courts are divided. This Court's immediate intervention is both warranted and essential to avoid continuing and repetitive litigation of this issue across the country and to provide the appropriate safeguards to preserve the sound

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city from applying business activities tax to unapportioned gross receipts of a broker–dealer generated by registered representatives working in other States).

Other state courts, however, have held that the Commerce Clause does not require such apportionment. *Centric–Jones Co. v. Town of Marana*, 937 P.2d 654 (Ariz. App. 1996) (Commerce Clause does not bar State from applying business activities tax to contractor's gross receipts, although 15.2% of the contracting activity occurred outside the taxing jurisdiction); *Saudi Refining, Inc. v. Director of Revenue*, 715 A.2d 89 (Del. Super. 1998) (Commerce Clause does not bar a State from applying business activities tax to unapportioned gross receipts from wholesale sales consummated by physical delivery in state); *ITT Educ. Servs., Inc. v. Taxation & Revenue Dep't of New Mexico*, 959 P.2d 969 (N.M. 1998) (Commerce Clause does not bar State from applying business activities tax to school's unapportioned receipts for its services, although some portion of the services were performed outside of State); *Promus Hotels, Inc. v. City of Charleston*, No. 01–AA–142 (W. Va. Cir. Ct. Kanawha Cty. March, 18, 2003) (Commerce Clause does not bar city from applying business activities tax to unapportioned gross receipts derived by taxpayer from franchisees located in the city).

functioning of our national common market that the Commerce Clause protects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Supreme Court of the State of Washington

FORD MOTOR COMPANY, Appellant, v. CITY OF SEATTLE, EXECUTIVE SERVICES DEPARTMENT, Respondent FORD MOTOR COMPANY, Appellant, v. CITY OF TACOMA, Respondent	NOs. 77167-7, 77516-8

ALEXANDER, C.J. We granted direct review of two separate trial court orders that upheld the imposition by the cities of Seattle and Tacoma (Cities) of a business and occupation (B & O) tax upon the Ford Motor Company (Ford) for its activities related to being in the business of making wholesale sales to dealers. Ford filed separate legal actions against both Cities in order to recover B & O

taxes, interest, and penalties it paid. We now review whether the Cities used the proper tax classification and tax measure in calculating Ford's B & O taxes. We conclude that they did and consequently affirm the determinations of both trial courts.

I

Ford is a Delaware corporation, registered to do business in the state of Washington. Ford's principal place of business is in Dearborn, Michigan. Ford has manufacturing plants in several states, but none in Washington. Although Ford maintains an office in Bellevue, Washington, it does not directly sell vehicles to consumers in the cities of Seattle or Tacoma.

Ford does, however, sell automobiles, parts, and accessories to independent dealers located within the cities of Seattle and Tacoma. These dealers, in turn, sell the automobile parts and accessories to retail customers. Ford also conducts a variety of business activities within Seattle and Tacoma related to the sale of its cars, parts, and accessories to dealers. These activities include: advertising, sending representatives to meet with its dealers and their part managers, imparting information about new products, discussing problems and customer satisfaction concerns, and marketing and selling warranties on its automobiles. Ford has stipulated that all of these activities were for the business purposes of selling Ford products to dealers located in Tacoma and Seattle and helping those dealers sell Ford products to retail customers.

The City of Seattle audited Ford for the period of January 1998 through December 2002. It then assessed a B & O tax, on the ground that Ford was engaged within Seattle in the business of making sales at wholesale and assessed the tax on the entire gross proceeds from vehicles sold to Seattle dealers. Ford paid the assessed amount of $401,968. It then filed a lawsuit in King County Superior Court to obtain a refund and declaratory judgment as to the proper method of calculating its tax liability. The City of Seattle moved for a summary judgment dismissing Ford's claims. The trial court granted the City's motion, determining that there was no merit to Ford's claims that (1) it did not make sales within the City of Seattle as that term is used in the Seattle Municipal Code and (2) the gross income Ford received from its dealerships had to be apportioned in order to be constitutional.

The City of Tacoma also audited Ford, imposing a B & O tax, interest, and penalties for the period from January 1, 1990, through December 31, 2002 (audit period). Ford paid the amount assessed of $1,307,933.83 and filed suit in Pierce County Superior Court seeking a refund. After a bench trial, the trial court dismissed Ford's classification and apportionment challenges, which were the same as those made in the King County suit. That court also denied Ford's separate claims that (1) the City of Tacoma was barred from collecting taxes for the period from 1994 through 1999 by the statute of limitations and (2) Ford was not properly assessed.

Ford appealed both the King County summary judgment order and the Pierce County trial

judgment, seeking direct review in this court. The two appeals were consolidated, and review was granted pursuant to RAP 4.2(a)(4), our court determining that both cases presented issues of substantial public importance.

II

A B & O tax is an excise tax imposed for "the privilege of doing business" in a particular jurisdiction. 1B KELLY KUNSCH ET AL., WASHINGTON PRACTICE: METHODS OF PRACTICE § 72.7, at 452 (1997). Washington imposes a B & O tax for the privilege of doing business in this state. RCW 82.04.220. Cities may also impose their own B & O tax for the exercise of the privilege within that city. The value of the "privilege is measured by the gross proceeds of the business; the rate of tax is determined by the type of business in which the taxpayer is engaged." 1B KUNSCH ET AL., *supra*, § 72.7, at 452.

A tax statute has three basic elements: "First, there must be an incident that triggers the tax." *Id.* § 72.3, at 449. The "taxable incident" is the "activity that the legislature has designated as taxable." *Id.* Second, there must be a base that represents the value of the taxable incident. This is known as the "tax measure." *Id.* Third, there must be a "tax rate," which, when multiplied by the tax measure, determines "the amount of tax due." *Id.* At issue in this case are the taxable incident and tax measure of Seattle and Tacoma's B & O tax.

A. The Taxable Incident

It is well established that the tax "incident" for a B & O tax is generally the " 'act or privilege of engaging in business activities' " in the taxing jurisdiction. *Id.* § 72.6, at 451 (quoting RCW 82.04.220). Unlike a sales tax, which taxes a specific sale of a good or service, the B & O tax is imposed on the general privilege of engaging in business. As noted above, Seattle and Tacoma both impose B & O taxes on the "privilege of engaging in business activities within" their respective cities. Seattle Municipal Code (SMC) 5.45.050; former Tacoma Municipal Code (TMC) 6.68.220 (1998).[1]

A major determinant of B & O tax liability is how the taxed activity is classified. Under the relevant codes, the tax rate is based upon the type of business activity performed by the taxed entity within the applicable city. The various types of activity include (1) "engaging ... in the business of making sales ... at wholesale" within the city, under SMC 5.45.050(C), and (2) the general classification for engaging within the city in "any business activity other than or in addition to those enumerated in the

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[1] During the audit period, the City of Seattle reorganized and amended its tax code by enacting chapter 5.45 SMC and repealing chapter 5.44 SMC effective January 1, 2002. Consequently, two different code provisions were in effect. Despite the change, the substance of the city's B & O taxation scheme remains substantively the same and the revisions do not impact the analysis in this case.

above subsections," under SMC 5.45.050(G). *See* former TMC 6.68.220(B)(F)(2).[2]

The Cities imposed their B & O tax on Ford under the "engaging in the business of making sales at wholesale" provision. In relevant part, Seattle's provision is as follows:

> Upon every person engaging within the City in the business of making sales ... at wholesale or retail ...; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of such sales of the business without regard to the place of delivery of articles, commodities or merchandise sold, multiplied by the rate of two hundred fifteen one-thousandths of one percent (.00215).

SMC 5.45.050(C). The City of Tacoma has a similarly worded provision in its tax code, former TMC 6.68.220(B), with the exception that its tax rate is one hundred two one-thousandths of one percent (.00102).

Ford contends that its activities were improperly classified because it did not make sales at wholesale within the Cities. Ford would have us

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[2] The tax rate on "making sales" is .00215 in Seattle and .00102 in Tacoma. SMC 5.45.050(C); former TMC 6.68.220(B). The tax rate on other business activities is .00415 in Seattle and .0038 in Tacoma. SMC 5.45.050(G); former TMC 6.68.220(F).

construe SMC 5.45.050(C) and former TMC 6.68.220(B) narrowly, holding the taxable incident to be the actual sale of products within the respective taxing jurisdictions to dealers. Ford contends that proper application of the B & O tax ordinances would classify its business activities in the Cities under the "other business activities" provisions.

In analyzing the positions of the parties, we start with the principle that the burden is on the taxpayer to prove that a tax paid by him or her is incorrect. In other words, "[t]axes are presumed to be just and legal, and the burden rests upon one assailing the tax to show its invalidity." 72 AM.JUR.2D *State and Local Taxation* § 1000 (2001).

Municipal ordinances, such as the ordinances at issue here, are local statutes that are to be construed according to the rules of statutory construction. *McTavish v. City of Bellevue,* 89 Wash.App. 561, 565, 949 P.2d 837 (1998). Where a statute is clear on its face, its plain meaning should "be derived from the language of the statute alone." *Kilian v. Atkinson,* 147 Wash.2d 16, 20, 50 P.3d 638 (2002) (citing *State v. Keller,* 143 Wash.2d 267, 276, 19 P.3d 1030 (2001)). Constructions that would render a portion of a statute "meaningless or superfluous" should be avoided. *Keller,* 143 Wash.2d at 277, 19 P.3d 1030. Construction of a statute is a question of law that is reviewed *de novo. W. Telepage, Inc. v. City of Tacoma,* 140 Wash.2d 599, 607, 998 P.2d 884 (2000). However, when construing an ordinance, a "reviewing court gives considerable deference to the construction of" the challenged ordinance "by those officials charged with

its enforcement." *Gen. Motors Corp. v. City of Seattle,* 107 Wash.App. 42, 57, 25 P.3d 1022 (2001).

Here, the Cities, who enforce their own municipal codes, reach the same conclusion as the trial courts: A B & O tax on engaging in the business of wholesaling is levied upon the privilege of doing business as a wholesaler, not upon the actual sales at wholesale. We agree. A tax imposed on the actual sale of products is, by definition, a sales tax. B & O taxes, on the other hand, are not sales taxes. The Cities' municipal codes plainly tell us that their B & O taxes are imposed on "the act or privilege of engaging in business activities within the City." SMC 5.45.050; former TMC 6.68.220. Therefore, the plain meaning of the statutes at issue is that the taxable incident in SMC 5.45.050(C) and former TMC 6.68.220(B) is "*engaging* within the City *in the business of* making sales ... at wholesale," not merely "making sales at wholesale." (Emphasis added.) To find otherwise would render the words "engaging ... in the business of" superfluous.

Engaging in the business of wholesaling encompasses more business activities than merely making sales. Both Seattle and Tacoma define "business" within their tax code as "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." SMC 5.30.020(G); former TMC 6.68.125 (1965). This definition is intentionally broad. *See* SMC 5.30.030(B)(5). The SMC offers several specific examples of activities considered "engaging in business," including "[s]oliciting sales," performing "warranty work," and

"[m]eeting with customers or potential customers." SMC 5.30.030(B)(3)(c), (d), (*l*).

There is little question that Ford's activities fall within that broad classification. Ford does not dispute that it is in the business of making sales at wholesale. Ford also admits that it engages in activities within the Cities that are related to its business of making wholesale sales to dealers. Some of those activities are of the sorts offered as examples in the SMC. We conclude, therefore, that Ford was properly classified and taxed as one engaging in the business of wholesaling within the Cities.

Because we conclude that the taxable incident is engaging in the business of wholesaling and the challenged ordinances are clear on that point, it does not matter in which jurisdiction the actual sales at wholesale occur. Thus, Ford's argument that the terms of its contracts control the location of the sale is misdirected. As we observe hereafter, the location where title is transferred under the terms of a contract does not determine whether a city can impose a privilege tax.

Division One of the Court of Appeals has rejected an argument similar to the one Ford advances here, in the case of *General Motors,* 107 Wash.App. 42, 25 P.3d 1022. There, the court affirmed Seattle's imposition of the B & O tax presently before us on General Motors and the Chrysler Corporation, because the companies engaged in the business of making wholesale sales within Seattle. Although neither company engaged

in direct selling activities within the city, the court found that other business activities conducted by the companies "that are designed to assist the automakers in 'maintain[ing] a share of the market within the city'" were sufficient to subject them to Seattle's B & O tax. *Id.* at 48, 25 P.3d 1022 (alteration in original) (quoting SMC 5.44.022(8)).

That decision, which we declined to review, is consistent with our decisions in *General Motors Corp. v. State,* 60 Wash.2d 862, 376 P.2d 843 (1962), *aff'd on other grounds,* 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), and *Field Enterprises, Inc. v. State,* 47 Wash.2d 852, 289 P.2d 1010 (1955). In both, as here, goods were sold by out-of-state companies to Washington buyers and shipped free on board point of shipment. We upheld the imposition of the state B & O tax in both cases, reasoning that "the substance of each transaction occurs in Washington where the customer is located." *General Motors Corp.,* 60 Wash.2d at 876, 376 P.2d 843. In doing so, we rejected the argument that a contract specifying that title will transfer at a point out of state enabled the out-of-state seller to avoid the tax.

Ford cites to several cases in which courts have determined that the parties' commercial contract established where, for tax purposes, a sale is made. *See, e.g., McLeod* v. *J.E. Dilworth Co.,* 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944); *Weyerhaeuser Co. v. Dep't of Revenue,* 106 Wash.2d 557, 723 P.2d 1141 (1986). However, these cases are neither persuasive nor relevant to the question at hand because they concerned the propriety of state

and local sales taxes. Looking at the place of sale is proper in the sales tax context because the incident of tax in that situation is the individual transaction. Such is not the case where a B & O tax is involved because, as we have observed above, the B & O tax is imposed upon activities associated with the privilege of doing business in the taxing jurisdiction.

The B & O tax levied by the Cities is neither a sales tax nor a tax on the passage of title to property. Rather, the target of the tax in this instance is the privilege of engaging in the wholesale business in the Cities. Thus, we affirm the trial courts' conclusions that Ford is engaged in the business of making wholesale sales and was properly classified and taxed as such.

B. The Tax Measure

The tax measure is the amount against which the tax rate is multiplied to find the amount of tax due. The tax measure of a B & O tax on wholesaling is generally the gross proceeds of sales of tangible personal property and services rendered by the business. 1B KUNSCH ET AL., *supra,* § 72.8, at 452. As noted above, both Cities' ordinances provide that the measure of their B & O tax upon wholesalers is the "the gross proceeds of such sales of the business without regard to the place of delivery of articles, commodities or merchandise sold." SMC 5.45.050(C); *see* former TMC 6.68.220. In other words, Seattle and Tacoma tax Ford based on the gross receipts of its wholesale sales to local dealers in the respective cities.

Ford contends that this tax measure violates Washington law, the Cities' ordinances themselves, and the commerce clause of the United States Constitution. Instead, Ford would have us limit the tax measure to that portion of gross income created solely by Ford's in-city activities, such as business meetings. Ford construes the law in this area to prohibit the Cities from taxing income derived from such activities as design of vehicles, production, accepting dealer orders and receiving payments. This argument too is without merit.

1. Validity of the tax measure under Washington law

First, Ford's argument that Washington law requires the Cities to piecemeal the tax measure among all of the jurisdictions in which all of the various activities related to the sale were conducted is a clear misreading of our decision in *Lone Star Cement Corp. v. City of Seattle,* 71 Wash.2d 564, 429 P.2d 909 (1967). In *Lone Star Cement,* we struck down on equal protection and privilege and immunities grounds the City of Seattle's B & O tax assessment on an out-of-state company who had plants in both Seattle and Concrete, Washington. The city attempted to measure its B & O tax by including the gross income from sales made at the Concrete plant, even when those sales were consummated outside of Seattle and the products delivered to places outside of Seattle. We disallowed the tax assessment on the products sold in Concrete, as these sales had no connection to the company's activities in Seattle and, thus, were beyond Seattle's taxing power. We did not, however, rule that Seattle

could not tax Lone Star Cement on the entire gross receipts of sales to customers within Seattle, even when the products sold were manufactured elsewhere. In fact, Lone Star Cement paid B & O taxes on those products without protest. We only excluded from the measure of Seattle's B & O tax the revenue from products manufactured, sold, and delivered outside Seattle--revenue essentially unconnected to Seattle.

This was the same type of overreaching that the United States Supreme Court disallowed in *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272 (1939). There, the taxpayer marketed, shipped, and sold fruit in places throughout the country, including Washington State. Washington asserted that it had the authority to measure its B & O tax on all of the business's gross receipts from interstate activities, whether conducted inside or outside of Washington. The United States Supreme Court invalidated Washington's tax, because it was not apportioned to the activities within the state, but rather was impermissibly based upon the *entire volume of interstate commerce* in which the taxpayer participated.

Clearly, such is not the scenario here. By their very terms, the Cities' ordinances limit their taxing power to only those gross receipts derived from the sale of goods delivered into the Cities. This places the Cities' tax measure squarely within the boundaries allowed under *Lone Star Cement* and *Gwin, White & Prince.* The measure of tax would be invalid if it included all gross income earned by Ford

on its interstate sales or even if it included gross income derived from sales made in other areas of this state. However, that is not the case with which we are presented. In this case, the Cities properly limited their tax measure to only those sales that were connected to Ford's business activities in their respective jurisdictions.

2. Validity of the tax measure under the Cities' ordinances and tax rules

Second, the ordinances themselves are no more restrictive than Washington law requires. Ford is correct that under the terms of its own ordinances, the Cities may only measure the B & O tax based upon gross income derived from Ford's business activities in the cities. SMC 5.45.080(B) provides that the taxpayer shall allocate to the City "that portion of the taxpayer's gross income or gross proceeds of sales that are derived from business activities performed in the City." Former TMC 6.68.220(B) requires the taxpayer engaged in the business of making sales at wholesale to pay tax on an amount "equal to the gross proceeds of sales of such business."

However, Ford is not correct that the Cities have gone beyond permissible bounds in their application of the ordinances. The language Ford construes as restraining the Cities' power to reach any of Ford's interstate sales instead is merely designed to contain the measure of the tax within permissible bounds. Ford admits that it can be taxed on "income derived from activities performed within the city." Appellant's Br. of Ford Motor Co. at 20.

Revenue from sales to dealers in Seattle and Tacoma is *derived* from Ford's activities in the Cities because those activities create the opportunity for the sales.

Neither do the Cities' tax rules exclude all of Ford's interstate sales from the tax measure. Tacoma Tax Rule 103, defining where a sale is deemed to have occurred, is irrelevant in the present case, because B & O taxes do not depend upon where actual sales occur. Tacoma Tax Rule 103 (on file with Tacoma Fin. Dep't, Tax & License Div.). Another Tacoma Tax Rule, 193-A, excludes certain goods delivered to a purchaser "at a point outside the state" from wholesaling business taxes. Def.'s Ex. 28 at 769. However, this rule applies only when the goods originated in Tacoma and were sold to purchasers who were located in other cities or states. Wholesaling is considered a unitary activity occurring solely in the purchaser's jurisdiction the jurisdiction to which the goods are physically delivered. *Tyler Pipe Indus.* v. *Wash. Dep't. of Revenue,* 483 U.S. 232, 251, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987). Thus, when goods are sold by a wholesaler in Tacoma but delivered to a dealer who is outside Tacoma, the sale at wholesale is considered to have been made entirely in the dealer's jurisdiction, so Tacoma cannot tax it. Tacoma Tax Rule 193-A simply states this rule. Like the ordinances themselves, it restrains the tax measure to permissible bounds.

The dissent asserts that one of Seattle's tax rules limits the wholesaling tax to people actually selling goods within Seattle. Dissent at 5. We disagree. Seattle Business Tax Rule 5-44-194(2)(a)

provides in part: "Any person(s) who sells or leases personal property to buyers or lessees within the City are taxable under the retailing or wholesaling tax classification...." Seattle Bus. Tax Rule 5-44-194 (on file with Seattle Dep't of Executive Admin., Revenue & Consumer Affairs Div.). The words "within the City" follow the phrase "buyers or lessees," not the phrase "sells or leases," which tends to indicate that "within the City" modifies the nouns "buyers" and "lessees." If the City of Seattle instead wanted these words to modify the verb "sells," it could have phrased the rule differently, as it did in the very ordinance at issue here; in SMC 5.45.050(C), "within the City" immediately follows the verb "engaging." Thus, it would appear that Seattle Business Tax Rule 5-44-194 was not intended to limit wholesaling taxes to people who sell within Seattle, but rather, to people who sell goods to *purchasers* who are located within Seattle. Like Tacoma's tax rules, this comports with the rule that wholesaling is deemed to occur entirely within the purchaser's jurisdiction.

3. Validity of the tax measure under the commerce clause

Finally, we reach Ford's argument that the current tax measure unduly burdens interstate commerce and, thus, violates the commerce clause of the United States Constitution.[3] A state tax on interstate commerce does not violate the commerce clause so long as "the tax is applied to an activity

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[3] U.S. CONST. art. I, § 8, cl. 3

with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). If a local taxing scheme fails any one of these four requirements, it is invalid. However, it has long been recognized that it is " 'not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.' " *Gen. Motors Corp.* v. *Washington,* 377 U.S. 436, 439, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964) (quoting *W. Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 254, 58 S.Ct. 546, 82 L.Ed. 823 (1938)), *overruled on other grounds by Tyler Pipe,* 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199. Ford does not challenge that their activities within the Cities satisfy the "substantial nexus" prong of the *Complete Auto Transit* test. *See* Appellant Br. of Ford Motor Co. at 8. Thus, we address only the remaining three requirements.[4]

The fair apportionment prong ensures that each State taxes only its fair share of an interstate

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[4] The City of Seattle claims that Ford challenges the third and fourth prongs of the Complete Auto Transit test for the first time on appeal, making the challenge untimely. Ford disputes the city's allegation. We note that even if this claim is true, RAP 2.5(a) does not prevent us from reviewing these issues on appeal, but merely allows us discretion to refuse review. Because Ford did raise a commerce claim challenge below, and in the interests of fully resolving that challenge, we address the third and fourth prongs along with the second.

transaction. *Okla. Tax Comm'n* v. *Jefferson Lines, Inc.,* 514 U.S. 175, 184-85, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). The prong has two parts: the tax must be internally consistent and externally consistent. "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Id.* at 185, 115 S.Ct. 1331. External consistency depends on the practical effect of a tax, existing where a tax is economically justified, such that it does not "reach[ ] beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Id.* Where a state tax (or local tax, as here) creates "the threat of real multiple taxation (though not by literally identical statutes)," the tax is externally inconsistent. *Id.* Ford contends that the Cities' B & O tax, as applied to Ford, is not fairly apportioned because it violates both the internal and external consistency tests.

The Cities point out that this challenge has been settled previously and adversely to Ford. The Cities are correct. In *General Motors,* 107 Wash. App. at 55-60, 25 P.3d 1022, the Court of Appeals, Division One, explicitly held that Seattle's B & O tax is fairly apportioned. The Court of Appeals determined that Seattle's B & O tax on wholesaling is internally consistent because the measure of the tax includes only wholesale sales of goods delivered to Seattle, thereby preventing the possibility that the out-of-state automakers could be subjected to the identical tax in another state for the same vehicles and parts. The court also determined that Seattle's B

& O tax was externally consistent because there was no evident danger of multiple taxation by outside jurisdictions and because a tax on the gross receipts of wholesaling activities is inherently apportioned. In reaching this conclusion, the court relied on the United States Supreme Court's decision in *Tyler Pipe,* 483 U.S. 232, 107 S.Ct. 2810.

In *Tyler Pipe,* the United States Supreme Court rejected appellant Tyler Pipe's apportionment challenge to Washington State's B & O tax, concluding that "the activity of wholesaling-whether by an in-state or an out-of-state manufacturer--must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Tyler Pipe,* 483 U.S. at 251, 107 S.Ct. 2810. The Court noted that Washington's B & O tax on interstate sales by out-of-state manufacturers, which is measured by the gross proceeds of sales to Washington buyers, was "'apportioned exactly to the activities taxed'" even though part of the value of the wholesale transaction was "attributable to manufacturing activity carried on in another State." *Id.* (quoting in part *Standard Pressed Steel Co.* v. *Dep't of Revenue,* 419 U.S. 560, 564, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975)).

The Cities' wholesale B & O taxes are very similar in the relevant aspects to the state statute at issue in *Tyler Pipe.* The Cities' privilege tax is measured by the gross proceeds of all sales to buyers within the taxing jurisdiction. Sales at wholesale to these buyers is an activity separate from manufacturing, design, and the like, which under *Tyler Pipe* must be considered conducted entirely

within the destination city. Because of this, no other state or jurisdiction within Washington can tax it. Ford faces no practical threat of multiple taxation due to the Cities' B & O taxes, so the ordinances are externally consistent. Even if the same ordinance were put into effect in every city across the nation, Ford would face no additional taxation as a result of being engaged in interstate commerce, so the ordinances are internally consistent. We conclude that the Cities' B & O taxes on wholesaling are, like the virtually identical Washington State statute, apportioned exactly to the activities taxed.

Ford relies primarily on a California case, a Pennsylvania Supreme Court case, and the United States Supreme Court's decision in *Jefferson Lines* to support its apportionment challenge. However, we find none of these cases persuasive.

In *General Motors Corp. v. City of Los Angeles,* 5 Cal.3d 229, 95 Cal.Rptr. 635, 486 P.2d 163 (1971), the California Supreme Court applied California constitutional provisions and the equal protection clause of the federal constitution to business privilege taxes on products manufactured and sold within the state of California. Since interstate commerce was not involved, the court was not required to examine the validity of the gross receipts tax under the commerce clause of the United States Constitution. Thus, the California holding is inapplicable in the instant case.

The Pennsylvania case actually contradicts Ford's argument. While the Pennsylvania Supreme Court did limit the reach of Philadelphia's business

privilege tax on *services* to receipts from services performed in the city, it recognized and emphasized that in levying a gross receipts tax on activities involving *manufacturing and sales,* "the state of origin can tax the manufacturing activity, and the state of destination can tax the selling activity," without requiring apportionment. *Phila. Eagles Football Club, Inc. v. City of Philadelphia,* 573 Pa. 189, 823 A.2d 108, 129 (2003).

Finally, this court has previously rejected the argument that *Jefferson Lines* somehow required us to revisit and overturn *Tyler Pipe's* holding. *W.R. Grace & Co. v. Dep't of Revenue,* 137 Wash.2d 580, 597, 973 P.2d 1011 (1999). In *W.R. Grace,* we reaffirmed that the measure of our state's B & O tax on engaging in wholesaling activities is fairly apportioned and constitutional. In sum, none of the cases relied upon by Ford put into doubt Seattle's constitutional ability to measure its tax by the entire gross proceeds of sales to dealers located in Seattle.

A tax violates the third prong of the *Complete Auto Transit* test only if it treats interstate and intrastate commerce differently. *Chi. Bridge & Iron Co. v. Dep't of Revenue,* 98 Wash.2d 814, 830, 659 P.2d 463 (1983). Ford argues the Cities' B & O taxes are discriminatory because they are not fairly apportioned. This argument fails for two reasons. First, we have already determined that the Cities' B & O tax schemes do not run afoul of *Complete Auto Transit's* fair apportionment requirement. Second, Ford confuses the third prong of the test with the second. The antidiscrimination prong is not about apportionment, but rather about whether a

transaction is taxed more heavily because it crosses state lines.

The taxpayers in *Chicago Bridge & Iron* raised a third prong challenge to the State's B & O tax. We rejected their argument, noting that Washington's tax scheme treats interstate and intrastate business equally, making no distinction between them. We concluded that under the state statute, both in-state and out-of-state wholesalers are taxed only once on their gross proceeds based on sales made within Washington.

So it is with the Cities' B & O tax scheme. The Cities' tax scheme only taxes the gross proceeds derived from sales made and delivered to their respective jurisdictions. Their tax measure includes receipts from all products delivered into the jurisdiction, regardless of the place of origin. The fact that Ford may be taxed on manufacturing by the State where its products are manufactured, as well as taxed by Washington State and one of the Cities, does not constitute discrimination against interstate commerce and does not present grounds for this court to declare the Cities' B & O tax scheme unconstitutional. *Accord Am. Nat'l Can Corp. v. Dep't of Revenue,* 114 Wash.2d 236, 241-46, 787 P.2d 545 (1990). We find that, like Washington State, the Cities impose their B & O wholesaling taxes equally upon interstate and intrastate business, making no distinction between them.

A tax violates the fourth prong of the *Complete Auto Transit* test only if the measure of the tax "bears no relationship to the taxpayers'

presence or activities in a State." *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609, 629, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). We noted in *Chicago Bridge & Iron* that this prong "is easily met." *Chi. Bridge & Iron,* 98 Wash.2d at 832, 659 P.2d 463. This fourth requirement "does not address the rate or amount of the tax." *Id.* Nor does it require, as Ford asserts, that we compare the actual value of the services provided by the Cities with the income taxed. Instead, the fourth prong is tied to the first, nexus, and requires that the tax measure, as well as the tax incident, be "'tied to the earnings which the State ... has made possible.'" *Id.* (quoting *Commonwealth Edison,* 453 U.S. at 626, 101 S.Ct. 2946 (quoting *Wisconsin* v. *J.C. Penney Co.,* 311 U.S. 435, 446, 61 S.Ct. 246, 85 L.Ed. 267 (1940))).

In *Chicago Bridge & Iron,* we concluded that although the taxpayer formalized its construction contracts outside the state, its presence and activities in Washington were fairly related to the services provided by the State. In reaching our decision, we looked at the taxpayer's specific activities in Washington, such as maintaining an office and selling products to consumers here, and at the services provided by the State broadly, such as "police and fire protection, the presence of a trained work force, and the general 'advantages [accorded to the taxpayer] of a civilized society." *Chi. Bridge & Iron,* 98 Wash.2d at 832, 659 P.2d 463 (quoting *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 445, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979)).

This prong is also easily satisfied in this case. In addition to Ford's meetings with its dealers

within the limits of the Cities, Ford's presence in the Cities allows for its products to be delivered to, marketed, and sold in the Cities--activities that clearly bear a relationship to the gross proceeds it receives from area dealers. Furthermore, as in *Chicago Bridge & Iron,* the Cities more broadly provide Ford with an orderly and civilized place to conduct its business activities.

In sum, there is no authority that supports Ford's assertion that the tax measure imposed on the activity of wholesaling must be broken down and apportioned to the places where each discrete step in the wholesaling process is conducted. Both Washington law and holdings of the United States Supreme Court treat wholesaling as a single, unitary activity, separate from the manufacturing and design processes. Accordingly, a long line of precedent sanctions using the gross proceeds from wholesale sales delivered into a jurisdiction as the measure of a B & O tax, when the taxpayer is engaged in the business of fostering wholesale sales within the taxing jurisdiction. The Cities' B & O tax measure is in accordance with this jurisprudence. Furthermore, because the Cities' B & O tax scheme meets all four requirements of the *Complete Auto Transit* test, we find that it does not violate the federal commerce clause. The fact that some portions of the wholesaling process take place outside of the taxing jurisdiction is not controlling and does not, as Ford asserts, require the Cities to exclude such activities from the tax measure.

III

Ford also challenges the City of Tacoma's assessment of taxes from 1994 through 1999, claiming it is barred by the statute of limitations. Ford claims, additionally, that it was never properly assessed. We reject both of these claims.

Tacoma assessed Ford in 2004. At that time, Tacoma's statute of limitations prohibited collection of taxes "more than four years after the close of the calendar year in which they were due." Former TMC 6.01.090(3) (2002).[5] However, the same ordinance provided two exceptions to the four-year limitation: (1) when a taxpayer was not registered to do business in the city at the time of assessment and (2) when a taxpayer had not filed a tax return for the periods at issue. In either of these cases, taxes could be collected for the 10 years prior.

It is not disputed that Ford was registered at the time the assessment was issued in 2004. Thus, only the second exception is at issue here. The TMC does not define what constitutes a tax return. State

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[5] In relevant part, former TMC 6.01.090(3) provides:

> "(3) The Director shall not assess ... additional taxes ... due more than four years after the close of the calendar year in which they were due, except ...;
>
> "(a) Against a person who is not currently registered or has not filed a tax return as required by this chapter for taxes due within the period commencing ten years prior to the close of the calendar year in which the person was contacted in writing by the Director...."

law defines a tax return as "a tax or information return ... required by, or provided for or permitted under, the laws of this state which is filed with the department of revenue." RCW 82.32.330(1)(b). Federal courts have interpreted a tax return to be a document that "contains financial data, ... which would allow for a computation" of the appropriate tax. *Hess v. United States*, 785 F. Supp. 137, 138 (E.D. Wash. 1991) (citing *United States v. Long*, 618 F.2d 74 (9th Cir.1980)).

Ford acknowledges it did not file a formal tax return. However, Ford argues that because it registered as a business in 2000 and back-paid the license fees for the years 1994-1999 at that time, it filed a return for those years. Essentially, Ford asks us to consider its business license applications to constitute tax return, because the applications require a minimal amount of financial data and payment of a fee.

Ford's argument fails for three reasons. First, the annual business license application is exactly that--a license application, not a return. It is designed to license a company to engage in business, not to provide financial information for taxation purposes. Second, although the license applications may request some financial data, they do not require the provision of sufficient financial data to allow for a computation of the appropriate tax. Third, even if the license applications could be considered returns, Ford failed to file them until 2000. Had Ford filed them in the years they were

due, Tacoma might have known to request tax returns and payment of taxes at that time. However, Ford failed to provide such notice of its business activities in a timely manner. Its belated filing of license applications cannot now be used to avoid paying its fair share of the tax burden to Tacoma. We affirm the trial court's conclusion that Ford did not file valid tax returns for the 1994-1999 tax period, allowing the City of Tacoma to collect taxes owed for those years.

Ford goes on to allege that it was not properly assessed. Generally, when a tax assessment is challenged, courts will presume that the assessor has performed his or her duties properly and fairly and require the taxpayer to shoulder the burden of proving otherwise. 72 AM.JUR.2D State and Local Taxation § 637 (2001); *Nathan v. Spokane County*, 35 Wash. 26, 34, 76 P. 521 (1904). We give great deference to the trial court's weighing of evidence. Our review, in such cases, "is limited to determining whether substantial evidence supports the findings" and conclusions of the trial court. *Org. to Pres. Agric. Lands v. Adams County*, 128 Wash.2d 869, 882, 913 P.2d 793 (1996) (citing *Ridgeview Props. v. Starbuck*, 96 Wash.2d 716, 719, 638 P.2d 1231 (1982)). "'Substantial evidence' exists when there is a sufficient quantum of proof to support the trial court's findings of fact." *Id.* (quoting *In re Sego*, 82 Wash.2d 736, 739-40, 513 P.2d 831 (1973)).

The Pierce County Superior Court concluded that Ford failed to meet its burden of proof on this

challenge, finding the two field reports issued by Tacoma in April 2004 to have been valid tax assessments. There is evidence to support the superior court's conclusion on this issue. The field reports were mailed to Ford, identified the years for which tax was due, and stated the specific amount owing. The reports evidently provided adequate notice to Ford of its obligations, since Ford subsequently paid the assessed amount and filed a lawsuit challenging it. Furthermore, the superior court heard evidence of the City of Tacoma's procedures in assessing taxes, the degree to which the reports given complied with their usual form of notice, and computer issues the city was having at that time. We will not engage in a reweighing of this evidence, particularly in light of the fact that the Ninth Circuit Court of Appeals has previously concluded, "The form on which a notice of assessment and demand for payment is made is irrelevant as long as it provides the taxpayer with all the information required," providing adequate notice that taxes are due. *Elias v. Connett*, 908 F.2d 521, 525 (9th Cir. 1990); *see also Hughes v. United States*, 953 F.2d 531, 536 (9th Cir. 1992).

Similarly, we will not reweigh the evidence on the authority of the auditor to make the assessment, as Ford asks us to do. The superior court concluded that the auditor who conducted Ford's audit was acting under the authority of the director of finance. The TMC provides that the director of finance shall audit and assess the taxpayer. *See, e.g.*, former TMC 6.01.090(3). It also provides that the term "[d]irector" means the director of finance or any city officer

designated by him to act on his behalf. Former TMC 6.68.023 (1991). The trial court determined that the senior auditor who carried out the audit was acting as a duly authorized designee of the director of finance. This finding is supported by the record.

IV

The B & O tax levied by the Cities is neither a sales tax nor a tax on the passage of title to property. Rather, its tax incident is engaging in the wholesale business in the cities of Seattle and Tacoma. Ford's activities conducted in the Cities fall within this definition. Thus, we affirm the trial courts' conclusions that Ford is engaged in the business of making wholesale sales and was properly classified and taxed as such.

Ford's apportionment and commerce clause challenges to the measure of the B & O tax are governed by settled Washington and United States Supreme Court law. A long line of precedent upholds the gross proceeds of sales at wholesale that derive from activities within the taxing jurisdiction as a valid and constitutional measure for a B & O tax on wholesaling. Ford does not present sufficient grounds for departing from the reasoning and application of those opinions. Thus, we also affirm the trial courts' conclusions that the measure of the Cities' B & O tax is fairly apportioned and does not violate the federal commerce clause.

Finally, we find the Pierce County Superior Court's challenged findings of fact and conclusions of law to be supported by substantial evidence. We

uphold its determination that Tacoma's assessment was valid and Tacoma may collect B & O taxes from the 1994-1999 period.

Accordingly, we affirm both trial courts.

WE CONCUR: SUSAN OWENS, BARBARA A. MADSEN, MARY E. FAIRHURST and BOBBE J. BRIDGE, JJ.

SANDERS, J. (dissenting).

Today's holding allows City of Seattle and City of Tacoma to reach two thousand miles beyond their borders to tax automobile sales made in Dearborn, Michigan. Ford admits it engages in some business activities in both Seattle and Tacoma, however, argues it is beyond either city's taxing power to tax sales completed outside their jurisdictions.

Title, ownership, and possession of all Ford's vehicles transfer to the local dealerships when Ford delivers the vehicles to a common carrier at its factory in Michigan. The majority conveniently ignores this fact, claiming it is only necessary to find Ford engaged in some business activities here. I disagree. We must follow the plain meaning of both cities' taxing ordinances to hold sales in Michigan are not taxable under these ordinances, although other business activity which occurs within the municipal jurisdictions may be. Moreover any attempt by a municipality to tax an out-of-state sale would violate the commerce clause.

I. The cities' ordinances do not allow taxation of out-of-state sales

Both cities have a tax scheme that provides different tax rates based upon different activities. Two classifications possibly apply: Seattle Municipal Code (SMC) 5.45.050(C) and former Tacoma Municipal Code (TMC) 6.68.220(B) (1998) applied to every person in the business of making sales at wholesale within the city[1] while SMC 5.45.050(F) and former TMC 6.68.220(F) are catch-all subsections that applied to all other activities not specifically listed in the respective ordinance. The majority claims the former classification applies. But this section applies to wholesale sales made only *within the city.* Both cities define a sale as transferring property's ownership or title for valuable consideration. SMC 5.30.050; former TMC 6.68.050 (1978).[2]

We apply the same rules of statutory construction to ordinances as we do statutes. *Kitsap*

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[1] In addition to SMC 5.45.050 and former TMC 6.68.220, former SMC 5.44.400 (1996) applied before 2002, though there is no material difference between the ordinances for our purposes.

[2] Additionally, Seattle defines a sale as transferring possession of property for valuable consideration. SMC 5.30.050. Before January 1, 2002, however, Seattle defined a sale as "the exchange of property as well as the sale thereof for money ... and any other contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price." Former SMC 5.44.026(1) (1996). According to all relevant definitions of sale, Ford sold the vehicles to local dealerships in Michigan.

County v. Mattress Outlet, 153 Wash.2d 506, 509, 104 P.3d 1280 (2005). And unambiguous ordinances must be applied by their plain meaning. *State v. Villarreal,* 97 Wash. App. 636, 641-42, 984 P.2d 1064 (1999). There is nothing ambiguous about these ordinances. Seattle and Tacoma both seek to tax Ford's wholesale sales, but these sales occurred outside both cities. A sale occurs where delivery takes place: "a sale takes place in this city when the goods sold are delivered to the buyer in this city...." Clerk's Papers (CP) (Tacoma) at 767 (Tacoma Tax Rule 103, Def.'s Ex. 28); *see also* WAC 458-20-103. To determine where delivery occurs we must look to the parties' contract and the relevant statutory law.

According to the contract, title is transferred when Ford delivers the vehicles to a carrier in Michigan. "'Delivery' means the act of transferring possession of tangible personal property." CP (Seattle) at 112 (Seattle Business Tax Rule 5-44-193A(2)(c)); *see also* CP (Tacoma) at 769 (Tacoma Tax Rule 193-A, Def.'s Ex. 29);[3] *see also* U.C.C. § 2-103(e) (2004) (defining delivery as "the voluntary transfer of physical possession or control of goods"). Ford's shipment contract specified the vehicles were released at the gate when they were transferred to

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[3] Delivery "includes among others the transfer of goods from consignor to freight forwarder or for-hire carrier, from freight forwarder to for-hire carrier, from one for-hire carrier to another, or from the for-hire carrier to consignee." Seattle Business Tax Rule 5-44-193A(2)(c); see also CP (Tacoma) at 769 (Tacoma Tax Rule 193-A). Therefore, Ford completed delivery to the dealerships when it transferred the vehicles to a for-hire carrier.

the carrier. This is a standard F.O.B. (free on board) point of shipment contract. Under RCW 62A.2-504, goods are delivered when the seller ships the goods. Specifically, the seller must:

> (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and
>
> (b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and
>
> (c) promptly notify the buyer of the shipment.

Id.; U.C.C. § 2-504 cmt. 1 ("The general principles embodied in this section cover the special cases of F.O.B. point of shipment contracts ...."); *see also* RCW 62A.2-308 (unless otherwise specified "the place for delivery of goods is the seller's place of business"). These requirements were met in Michigan when vehicles were sent to "Gate Release." CP (Tacoma) at 106-07 (Stipulation of Facts). Once building and testing is complete, a third party carrier inspects the vehicles, then transports them from the factory to a "drop zone," where Ford scans and releases each vehicle at exit ("Gate Release"). *Id.*

At gate release, Ford transfers title to the dealer, retaining only a security interest in the vehicle until full payment is made. *Id.* At that point Ford has voluntarily transferred physical possession of the goods; delivery has been made, and Ford is no longer responsible for the goods.[4]

While the majority disregards these facts and claims Ford is asking us to construe these ordinances narrowly, majority at 189, Ford is only asking we apply their plain meaning. "Any doubts as to the meaning of a statute under which a tax is sought to be imposed will be 'construed against the taxing power.'" *Weyerhaeuser Co. v. Dep't of Revenue,* 106 Wash.2d 557, 566, 723 P.2d 1141 (1986) (quoting *Duwamish Warehouse Co. v. Hoppe,* 102 Wash.2d 249, 254, 684 P.2d 703 (1984); *MAC Amusement Co. v. Dep't of Revenue,* 95 Wash.2d 963, 966, 633 P.2d 68 (1981)). The majority reads the cities' ordinances to allow a city to tax any business that engages in any activity that eventually leads to making sales, even when those sales occur outside the city. Majority at 189.

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[4] Seattle suggests Ford was still responsible because a buyer could reject the goods at its store in the city. This statement confuses two issues. Under RCW 62A.2-509(1)(a) "the risk of loss passes to the buyer when the goods are duly delivered to the carrier." If damage occurred during transit, Ford was not primarily liable. Of course, the perfect tender rule still applied; if Ford's shipments did not conform to the contract, then the dealership could have rejected the goods. This does not implicate Ford's delivery of the vehicles-that clearly occurred in Michigan.

The majority also ignores the cities' own rules. "Aside from the constitutional limitations of the State's power to tax, [a city] is bound by the explicit provisions of its own rules." *City of Tacoma v. Gen'l Metals of Tacoma, Inc.*, 84 Wash.2d 560, 564, 527 P.2d 1314 (1974). Tacoma Tax Rule 193-A provides: "Where the seller agrees to and does deliver the goods to the purchaser at a point outside the state, neither Retailing nor Wholesaling business tax is applicable."[5] CP (Tacoma) at 769; *see also* CP (Tacoma) at 767 (Tacoma Tax Rule 103) ("For the purpose of determining tax liability ... a sale takes place in this city when the goods sold are delivered to the buyer in this city ...."); *see also* WAC 458-20-103 ("For the purpose of determining tax liability ... a sale takes place in this state when the goods sold are delivered to the buyer in this state...."). Additionally, Seattle Business Tax Rule 5-44-194 provides "Any person(s) *who sells* or leases personal property to buyers or lessees *within the City* are taxable under the retailing or wholesaling tax classification...." CP (Seattle) at 120. Ford never sold any vehicles within Seattle and should not be taxed under the wholesaling tax classification.

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[5] In its Petition for Review, Ford neglects to inform this Court the relevant language is found in Tacoma Tax Rule 193-A, which applies to "SALES OF GOODS ORIGINATING IN TACOMA TO PERSONS IN OTHER STATES, CITIES, AND COUNTIES." CP (Tacoma) at 769. Nevertheless, the language evidences Tacoma's limitations on taxing goods delivered beyond its border. Additionally, part A provides that the place of delivery is determined by the parties' contract and when a common carrier takes charge of the goods.

The majority relies on a Court of Appeals decision in *General Motors Corp. v. City of Seattle,* 107 Wash.App. 42, 25 P.3d 1022 (2001) for support. But there General Motors (GM) and Chrysler argued "they [did] not engage in business activities." *Id.* at 48, 25 P.3d 1022. And here Ford wisely admits it did engage in business activities. GM and Chrysler, like Ford, also shipped the vehicles "fob factory via common carrier." *Id.* at 46, 25 P.3d 1022 (footnote omitted). The *General Motors* court found there was a sufficient nexus between the companies' activities in Washington and the B & O tax. *Id.* at 53, 25 P.3d 1022. But because neither GM nor Chrysler made sales in Seattle, the court said: "Although they may not be characterized as direct selling activities, they nevertheless constitute 'other business activities'...." *Id.* at 48, 25 P.3d 1022. Similarly, Ford's "other business activities" may be taxed, but sales made in Michigan are beyond the purview of either city's taxing power.

II. Taxing out-of-state sales violates the commerce clause

The commerce clause grants the United States Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The negative implication of this power prohibits a state (or city) from passing legislation that improperly burdens interstate commerce. *Okla. Tax Comm'n v. Jefferson Lines,* 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) ("[W]e have consistently held [the commerce clause] to contain a further, negative command, known as the dormant

Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject."). Therefore, a local tax is valid only "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

Each city's tax is measured by gross proceeds of out-of-state sales and therefore does not apportion the activities taxed. *See Standard Pressed Steel Co.* v. *Dep't of Revenue,* 419 U.S. 560, 564, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975); *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434, 440, 59 S.Ct. 325, 83 L.Ed. 272 (1939) ("Although the tax, measured by gross receipts, to some extent burdened the commerce, it was held that the burden did not infringe the commerce clause. Since it was apportioned exactly to the activities taxed, all of which were intrastate, the tax was fairly measured by the value of the local privilege or franchise."). No matter the trigger--be it engaging in business activities leading to making sales or making the sales themselves--each city nevertheless is not apportioning its respective tax between activity inside its jurisdiction and activity outside. Rather, each city is taxing 100 percent of sales that occur outside its jurisdiction in violation of the commerce clause. *ASARCO, Inc.* v. *Idaho State Tax Comm'n,* 458 U.S. 307, 315, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982) ("As a general principle, a State may not tax value earned outside its borders.").

In *Tyler Pipe,* the United States Supreme Court found "the activities of Tyler's sales representatives adequately support the State's jurisdiction to impose its wholesale tax on Tyler." *Tyler Pipe Indus., Inc.* v. *Wash. State Dep't of Revenue,* 483 U.S. 232, 251, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987). But unlike Ford, Tyler Pipe sold its products in Washington. And while Tyler Pipe's activities could be taxed, the Court was careful to note the constitutional limitations on imposing a wholesale tax:

> Thus, the activity of wholesaling--whether by an in-state or an out-of-state manufacturer-must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax.

Id. at 251, 107 S.Ct. 2810. Clearly, Ford's wholesaling activities were not conducted wholly within Washington; its vehicles were sold in Michigan-title, ownership, and possession are transferred when Ford delivers the vehicles to a common carrier at its factory in Michigan.

The cities' tax on sales made in Michigan also burdens interstate commerce because of the threat of double taxation. The Supreme Court has said there is a risk of double taxation "whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed." *Jefferson Lines,* 514 U.S. at 184, 115 S.Ct. 1331. For example, the Supreme Court has found that when "[a] substantial part of [the taxed activity]

is outside the state ..., the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state...." *Gwin, White,* 305 U.S. at 438, 59 S.Ct. 325; *see also Gen. Motors Corp. v. City of Los Angeles,* 5 Cal.3d 229, 241, 95 Cal.Rptr. 635, 486 P.2d 163, 171 (1971) ("The gross receipts arising from this category of transactions must be apportioned in a manner which fairly reflects the proportion of in-city to out-of-city selling activities.").

Here the vehicles were made and sold in Dearborn, Michigan. Michigan may tax these sales. *Jefferson Lines,* 514 U.S. at 184, 115 S.Ct. 1331 ("It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State."). Consequently, when cities in Washington tax these sales it impermissibly burdens interstate commerce.

While Ford engages in some business activities within Seattle and Tacoma, its vehicles were sold in Michigan. Under the plain meaning of both cities' ordinances, neither Seattle nor Tacoma is allowed to tax sales in Michigan. Furthermore, allowing this tax clearly violates the dormant commerce clause as it taxes extraterritorial activities and threatens double taxation.

I dissent.

WE CONCUR: TOM CHAMBERS, CHARLES W. JOHNSON and JAMES M. JOHNSON, JJ.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

FORD MOTOR COMPANY,	)	
	)	ORDER
Appellant,	)	DENYING
	)	MOTION
v.	)	FOR
	)	RECONSIDERATION
CITY OF SEATTLE,	)	
EXECUTIVE SERVICES	)	
DEPARTMENT,	)	NO. 77167-7
	)	(consol w/ 77516-8)
Respondent.	)	
	)	
----------)		
	)	
FORD MOTOR COMPANY,	)	
Appellant,	)	
	)	
v.	)	
	)	
CITY OF TACOMA,	)	
Respondent.	)	
_____)		

The Court having considered the Appellant's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Appellant's Ford's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 6th day of August, 2007.

For the Court

CHIEF JUSTICE

APPENDIX C

THE HONORABLE RICHARD JONES
Hearing Date: May 6, 2005
9:00 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

FORD MOTOR COMPANY,	)	
	)	No. 03-2-38146-2SEA
Plaintiff,	)	
vs.	)	ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
CITY OF SEATTLE, DEPARTMENT OF DEPARTMENT, EXECUTIVE SERVICES	)	
Defendant.	)	

This matter came on for consideration pursuant to Defendants' Motion for Partial Summary Judgment. The Court has considered the arguments of counsel and the following documents on file herein:

1. Defendant's Motion for Partial Summary Judgment

2. Declaration Kent Meyer with attached Exhibits A through P

3. Plaintiff's Response to Motion for Partial Summary Judgment

4. Affidavit of Scott Edwards with attached Exhibits SE-1 through SE-9

5. Affidavit of Christopher Mucke with attached Exhibits CM-1 through CM-14

6. Affidavit of Jeffrey Marentic with attached Exhibit JM

7. Affidavit of Ricky Coley with attached Exhibits RC-1 through RC-4

8. Affidavit of Brandi Henry-Exarhos

9. Affidavit of Mary Beth Overmyer

10. Affidavit of Eric Watson with attached Exhibit EW-1

11. Affidavit of Karen Howlett

12. Affidavit of Thomas Eastman

13. Affidavit of Larry Tarnacki

14. Defendants' Reply in Support of Motion for Partial Summary Judgment with attached excerpts from deposition of Mel McDonald

Now therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants' Motion for Partial Summary Judgment is GRANTED and that Plaintiff's claims in its Second Amended Complaint are dismissed with prejudice except that Claim IV, paragraph 33 and Claim V are not dismissed by this order; and the Court further finds,

That this order effectively determines this action and final judgment shall be entered in favor of the City on the claims dismissed by the City's motion. There is no reason for delay of the entry of final judgment or appeal of the issues raised in the motion. An immediate appeal will conserve judicial and party resources by allowing for the resolution of the primary issues in this action. The May 23, 2005 trial date is stricken and action on the remaining claims is stayed pending exhaustion of any appeals.

DATED this 6 day of May, 2005.

_____
HONORABLE RICHARD JONES

Presented by:

THOMAS A. CARR
Seattle City Attorney

By _____
Kent C. Meyer, WSBA # 17245
Assistant City Attorney
Attorneys for Defendant City of Seattle,
Department of Executive Administration

Approved. as to form:

PERKINS COIE LLP

By _____
Scott M. Edwards, WSBA # 26455
Attorneys for Plaintiff Ford Motor Co.

APPENDIX D

Honorable Kathryn J. Nelson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

FORD MOTOR COMPANY, Plaintiff, v. CITY OF TACOMA, Defendant.	No. 04-2-08497-6 FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

THIS MATTER having come on for trial before the Court on the 9th day of June, 2005, the plaintiff appearing by and through its counsel, Scott M. Edwards of PERKINS COIE, LLP, and James C. Owen, appearing Pro Hac Vice, and the City of Tacoma appearing by and through its counsel, Kari L. Sand, Assistant City Attorney, and Cheryl F. Carlson, Assistant City Attorney; and the Court having considered the Stipulation of Facts, Exhibits 1 through 50 admitted into evidence, the testimony of Steve Marcotte, the trial briefs submitted by the parties and the

arguments of counsel; and the Court being fully advised makes and enters the following:

FINDINGS OF FACT

1. The City of Tacoma ("City") is a municipal corporation organized and operating under the laws of the State of Washington.

2. Ford Motor Company is a Delaware Corporation, registered to do business in the State of Washington, with its principal place of business in Dearborn, Michigan.

3. The parties' Stipulation of Facts dated June 9, 2005 is hereby incorporated by reference.

4. This action arises from the City's imposition of Business and Occupation ("B & O") taxes, interest and penalties for the period of January 1, 1990 through December 31, 1999 and additional B & O taxes, interest and penalties for the period of January 1, 2000 through December 31, 2002 (collectively the "audit period") in the total amount of $1,307,933.83 as contained in, and reflected by, two Field Auditor's Reports mailed to Ford on or about April 21, 2004. (Defense Trial Exhibits 22 and 23.)

5. The Field Auditor's Reports were not accompanied by a Notice of Assessment. Issues with the City's new computer system prevented automated production of a formal notice of assessment. The City's Finance Director testified that nothing prevented the City from manually preparing a Notice of Assessment for Ford.

6. Ford appealed Tacoma's imposition of B & O tax for the audit period claiming that the additional tax: (a) is barred for the period of 1994 through 1999 by statute of limitations; (b) is based on an improper classification of Ford's activities conducted within Tacoma; (c) fails to provide applicable deductions for amounts on which eligible gross receipts taxes were paid to another jurisdiction; (d) additional tax imposed under the service classification was improperly imposed on amounts that were not gross income of Ford; (e) for the period 2000 through 2002 additional tax imposed under the classification for making sales at wholesale was based on estimates that overstated Ford's gross income from Tacoma dealers; and (f) tax was imposed on income derived from activities conducted outside the City of Tacoma in violation of the plain language of the Code as well as Washington law. Ford also claims that using gross income from Tacoma dealers to measure tax under the classification for making sales at wholesale violates the U.S. Constitution because it does not apportion the tax base to reflect the contribution of activities performed outside the City and is not fairly related to services provided by Tacoma. The parties reached agreement prior to trial on Ford's claims identified in items (c), (d), and (e), above. These claims were not tried to the court.

7. Former TMC 6.68.050 was in effect during the audit period, and former TMC 6.01.090(3) was in effect when the Field Auditor's Reports were mailed.

8. Ford signed statute of limitations waivers in 2000 and 2001 for the 1990 and 1991 tax

years. Ford signed statute of limitations waivers in 2002 and 2003 for the 1992 and 1993 tax years, respectively. (Defense Trial Exhibit 21, Bates Nos. 00277-00279.) Ford does not assert a statute of limitations defense with respect to the City's imposition of tax for the years 1990 through 1993.

9. Ford does not assert a statute of limitations defense with respect to the City's imposition of tax for the years 2000 through 2003.

10. Former TMC 6.68.050, in effect during the audit period, defined "sale," in relevant part, as "any transfer of the ownership of or title to property for a valuable consideration ...."

11. Tacoma Tax Rule 103, in effect during the audit period, provides, in relevant part, "... For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in [Tacoma] when the goods sold are delivered to the buyer in [Tacoma], irrespective of whether title to the goods. passes to the buyer at a point within or without [Tacoma]."

12. Former TMC Section 6.68.075(1)(a), in effect during the audit period, provides, in relevant part, as follows:

> A taxpayer that has paid an eligible gross receipts tax with respect to a sale of goods or services to a jurisdiction in which the goods are delivered or the services are provided may deduct an amount equal to the gross receipts used to measure that tax from the measure of the tax owed to the City.

13. Any Finding of Fact set forth hereinabove which may be deemed to be a Conclusion of Law is hereby adopted as such.

From the foregoing Findings of Fact, the Court does make the following:

CONCLUSIONS OF LAW

1. This court has jurisdiction over this tax dispute pursuant to Section 6, article IV of the state constitution.

2. A taxpayer challenging a tax assessment bears the burden of demonstrating that the taxing authority's action is in error.

3. The Field Auditor's Reports issued by Tacoma on or about April 24, 2004 constitute tax assessments, notwithstanding the omission of any notice of assessment.

4. When Senior Auditor Jerry Wheeler first contacted Ford in writing in December 1989, Mr. Wheeler was acting as the duly authorized designee of the Director of Finance. Ford was not registered at the time of Mr. Wheeler's first contact.

5. Tacoma's assessments were timely. At the time the assessments were issued, valid waivers were in place for assessment of the years 1990 through 1993.

6. Former TMC 6.01.090(3) authorized a ten-year limitations period for taxpayers who, among other reasons, failed to file a return for taxes due within a period commencing ten years prior to the

taxpayer having been first contacted in writing by the Director of Finance or designee. Since Ford had not filed any returns for the ten-year period prior to being contacted in writing by the Director's designee in December of 1999, and was unregistered when tax returns for those years were due, Tacoma's assessment for the years 1994 through 1999 was timely under former TMC 6.01.090(3).

7. The assessments for the years 2000 through 2003 were within the four year limitation period of TMC 6.01.090(3).

8. Ford's proffered. construction of the statute of limitations provision of Tacoma's Code is contrary to the plain language of the Code.

9. Tacoma's definition of "engaging in business," set out in former TMC § 6.68.130 is broad, and encompasses all activities engaged in by Ford relating to its sales of vehicles and parts to dealers located in Tacoma.

10. For B & O tax purposes, the City of Tacoma, in administering its code, can define what it means by making sales at wholesale, and it has done so. Tacoma's Tax Rules 103 and 193-B clearly state that Tacoma is the place of sale for its B & O tax purposes.

11. Ford's argument, that the place of sale is determined by the passage of ownership and title in accordance with the terms of Ford's contracts with the dealers and commercial law, is not a reasonable construction of the applicable law. Neither the Uniform Commercial Code nor shipping terms, such

as f.o.b. factory, control the tax consequences of a wholesale transaction. Washington Department of Revenue Det. No. 98-146, 18 WTD 175 (1999) and Washington Department of Revenue Det. No. 99-216E, 18 WTD 264 (1999). Thus, for purposes of Tacoma's B & O tax, neither the terms of Ford's agreements with dealers nor the terms of shipping or insurance contracts determine the place of sale for Tacoma's tax purposes. Ford's reliance on the U.S. Supreme Court decisions *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304 (1944) and *McGoldrick* v. *Berwind-White Coal Company*, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (1940) in which the taxing jurisdiction's authority to impose tax was determined by the delivery terms in the parties sales contracts is misplaced as is Ford's reliance on *Weyerhaeuser Co. v. Dep't of Revenue*, 106 Wn.2d 557, 562-63, 723 P.2d 1141 (1986). Those cases are inapplicable.

12. A reviewing court gives considerable deference to the construction of an ordinance by those officials charged with its enforcement. *General Motors v. City of Seattle*, 107 Wn. App. 42, 57, 25 P.3d 1022 (2001).

13. Ford is engaged within the City of Tacoma in the business of making sales at wholesale. Tacoma correctly classified Ford's business activity in Tacoma under the wholesaling classification. The eight elements of Ford's Order Flow Process are constructed around Ford's business activities of making sales at wholesale of vehicles and parts that it manufactures. This is particularly evident in the Wholesale (step three) and Logistics (step eight) elements of the Order Flow Process, as

well as Ford's customer service activities conducted in Tacoma, all of which are engaged in for the express purpose of maximizing wholesale sales of vehicles and parts to Tacoma dealers. Wholesaling is a separate activity from, for example, manufacturing.

14. Ford argues that Tacoma's B & O tax should be apportioned to the business activities engaged in by Ford in Tacoma and not the full value of Ford's gross proceeds of wholesale sales to Tacoma dealers. This argument, however, cannot be reconciled with the language of the U.S. Supreme Court in *Tyler Pipe Indus., Inc.* v. *Washington Dep't of Revenue*, 483 U.S. 232, 251, 107 S. Ct. 2810, 97 L. Ed.2d 199 (1987) and the Washington State Supreme Court in *W.R. Grace & Co. v. State, Dept of Revenue*, 137 Wn.2d 580, 595, 973 P.2d 1011, 1018, *cert. denied*, 120 S. Ct. 371, 145 L. Ed.2d 290 (1999). The cases relied on by Ford, particularly *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995) and *Central Greyhound Lines* v. *Mealy*, 334 U. S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948) are inapplicable.

15. Ford's argument that the activity of "making sales at wholesale" is limited to the acts of transferring ownership or title within the city is contrary to the plain language of Tacoma Tax Rule 103, Time and Place of Sale. Where title to goods passes is irrelevant in determining the proper classification of Ford's business activities conducted within Tacoma.

16. Since Ford's activity of making sales at wholesale is an activity conducted wholly within

Tacoma that no other city has jurisdiction to tax, it is taxable by Tacoma measured by the full value of wholesale sales to local customers under the U.S. Supreme Court holding in *Tyler Pipe*, *supra*. In *Tyler Pipe*, the U.S. Supreme Court held that a B & O tax on interstate sales by out-of-state manufacturers measured by 100 percent of gross proceeds of sales was "apportioned exactly to the activities taxed," . . . "even though the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State that plainly has jurisdiction to tax that activity." *Tyler Pipe*, 483 U.S. at 251, 107 S. Ct. at 2822. In *W.R. Grace*, *supra*, the Washington Supreme Court relied on *Tyler Pipe* in acknowledging that the apportionment issue is well settled. *W.R. Grace*, 137 Wn.2d at 595.

17. *Tyler Pipe* makes clear that the unapportioned assessment of a taxing jurisdiction's B & O tax under the wholesaling classification against the full value of the taxpayer's sales to in-city customers is properly viewed as a tax on a separate activity conducted wholly within the taxing jurisdiction that no other taxing jurisdiction has authority to tax. There is no current Constitutional requirement that Tacoma's B & O tax on the activity of wholesaling tangible goods to customers located in Tacoma be apportioned.

18. Since Tacoma's B & O tax is measured only by the gross proceeds from the sale of vehicles and parts to dealers located in Tacoma, Tacoma is limiting its taxing powers to activities conducted in Tacoma and, further, there is no possibility that Ford could be subjected to a wholesale tax in another

jurisdiction for the same vehicles and parts that are sold to Tacoma dealers.

19. The deductions provided by former TMC 6.68.235, in effect. at the start of the audit, and former TMC 6.68.075(1)(a), in effect at the time of assessment, also prevented the risk of possible multiple taxation.

20. The U.S. Supreme Court has read the Commerce Clause of the U.S. Constitution to prohibit discrimination against interstate commerce, and to bar regulations that unduly burden interstate commerce. Under the test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed 2d 326 (1977) a tax is sustainable so long as the "tax (1) is applied to an activity with a substantial nexus with the taxing [authority], (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the [taxing jurisdiction]." 430 U.S. at 279. Tacoma's B & O tax satisfies all four prongs of the *Complete Auto* test.

21. Tacoma's B & O tax, as applied, does not violate the equal protection clause of the United States Constitution.

22. Tacoma's B & O tax, as applied, does not violate the due process clause of the United States Constitution.

23. Any Conclusion of Law set forth hereinabove that may be deemed to be a Finding of Fact is hereby adopted as such.

From the foregoing Conclusions of Law, the Court does make and enter the following:

DECISION

Ford Motor Company did not meet its burden of proof with respect to Counts 1-3 and 8-12 of its First Amended Complaint. Applying provisions of Title 6 of Tacoma's Municipal Code, and established Washington State and U.S. Supreme Court case law to the stipulated facts, and the documentary and testimonial evidence, the preponderance of the evidence is that Tacoma's assessments issued on or about April 21, 2004 were timely and correct, based on the information and documents known to and made available to Tacoma's auditor. The weight of the evidence further shows that Ford's business activity in Tacoma was and is properly classified as wholesaling. Finally, the evidence and controlling legal precedent make clear that Tacoma's B & O tax is inherently apportioned and is otherwise proper under the Commerce Clause.

For the foregoing reasons, Ford's prayer for relief in Counts 1-3 and 8-12 of its First Amended Complaint is denied.

DATED this 29th day of July, 2005.

_____

HONORABLE KATHRYN J. NELSON

Presented by:

ELIZABETH A. PAULI, Acting City Attorney

By: _____
KARL L. SAND
WSB #27355
Assistant City Attorney
Attorney for Defendant City of Tacoma

Approved as to form:

PERKINS COIE, LLP

By: _____
SCOTT M. EDWARDS
WSB #26455
Attorney for Plaintiff Ford Motor Company

APPENDIX E

Seattle Municipal Code

Section 5.45.050 Imposition of the tax – Tax or fee levied.

There is hereby levied upon and shall be collected from every person as hereinafter provided, for the act or privilege of engaging in business activities within the City, whether his or her office or place of business be within or without the City, a business and occupation tax or fee, sometimes herein referred to as the "tax." The tax shall be in amounts to be determined by application of rates against gross proceeds of sale, gross income of business, or value of products, including by-products, as the case may be, as follows:

* * *

C. Upon every person engaging within the City in the business of making sales at wholesale or retail (including public road construction), except persons taxable under subsection D of this section; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of such sales of the business without regard to the place of delivery of articles, commodities or merchandise sold, multiplied by the rate of two hundred fifteen one-thousandths of one percent (.00215).

* * *

Tacoma Municipal Code

Section 6.68.220 Persons subject to tax – Amount.

There is hereby levied upon and there shall be collected from every person as hereinafter provided for the act or privilege of engaging in business activities within the City of Tacoma ("City"), whether his/her office or place of business be within and/or without the City, a license fee or occupation tax, sometimes herein referred to as the "tax," in amounts to be determined by application of rates given against value of products, including by-products, gross proceeds of sales or gross income of business, as the case may be, for the three calendar months next preceding the beginning of each quarterly period. The tax classifications and rates applicable thereto are as follows:

* * *

B. Upon every person, except persons taxable under subsection E of this section, engaging within this City in the business of making sales at wholesale; as to such persons the amount of the tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one hundred two one-thousandths of one percent (.00102).

* * *

APPENDIX F

THE HONORABLE RICHARD A. JONES

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

FORD MOTOR COMPANY,	
Plaintiff,	NO. 03-2-38146-2 SEA
v.	SECOND AMENDED COMPLAINT FOR REFUND OF TAXES PAID
CITY OF SEATTLE, EXECUTIVE SERVICES DEPARTMENT,	
Defendant.	

FACTS COMMON TO ALL COUNTS

1. Plaintiff Ford Motor Company ("Ford") is a corporation organized, existing and in good standing under the laws of the State of Delaware, and is registered to do business pursuant to the laws of the State of Washington.

2. Defendant, City of Seattle, Washington (the "City"), is a city organized and existing under the laws of the State of Washington.

3. During the years applicable to this suit, vehicle dealers located throughout the United States (including several located in the City) purchased vehicles (and related parts) from Ford at Ford's assembly plants (and parts depots) located outside the State of Washington.

4. The Seattle Municipal Code ("SMC") 5.44.400 (for periods before 2002) and SMC 5.45.050 (for periods after 2001) levy an excise tax for the privilege of engaging in business activities within the City ("B & O tax"), and provide that the amount of tax is determined by multiplying the taxpayer's gross receipts by the applicable tax rate. These sections of the code provide that "making sales at wholesale" within the City is a taxable business activity.

5. Under the SMC, the measure of tax for persons engaged in the business of making sales at wholesale within the City is "the gross proceeds of such sales."

6. At various times, including in prior unrelated litigation, the City has asserted that its B & O tax on the privilege of making sales at wholesale is a tax on a single "inherently local" activity that occurs in only one location and therefore is capable of being subjected to tax in only one location.

7. SMC 5.30.050 defines a "sale" as the "transfer of the ownership of, title to, or possession of, property for a valuable consideration."

8. Ford transfers ownership, title and possession of all vehicles it sells to dealers at Ford's vehicle assembly plants. Ford transfers ownership, title and possession of the parts it sells to dealers at Ford's parts depots.

9. There are no Ford vehicle assembly plants or parts depots located within the City. All of Ford's vehicle assembly plants and parts depots are located outside the City.

10. All sales of Ford vehicles (and related parts) are made by the company at its assembly plants and parts depots, none of which are located in the City.

11. For the period January 1998 through June 2003, Ford paid the City B & O taxes with its filed tax returns in the amount of $970,663.68.

12. On or about September 19, 2003, Ford was assessed an additional $401,968.00 arising from a B & O tax audit, comprised of $265,083.07 in B & O tax, $131,957.73 in interest and $4,927.20 in penalties, all claimed by the City for the period January 1998 through December 2002.

13. On October 15, 2003, Ford paid the assessed tax, interest, and penalty, in the amount of $401,968.00 to the City.

14. On or about November 18, 2003, Ford filed a request for refund of B & O taxes paid with its tax returns with the Director of Revenue and Consumer

Affairs in accordance with SMC 5.55.100 and 5.55.140.

15. On or about December 1, 2003, Ford's request for refund of B & O taxes paid with its tax returns was denied.

16. Ford brings this Complaint challenging the validity and application of City B & O tax paid with Ford's returns and by assessment, pursuant to Washington Constitution, Article IV, Section 6 and RCW 2.08.010, which vest the Superior Court with original jurisdiction over all cases involving "the legality of any tax, impost, assessment, toll or municipal fine." Ford also seeks declaratory relief with respect to subsequent tax periods pursuant to Uniform Declaratory Judgments Act, RCW 7.24.010.

COUNT I - PLACE OF SALE

COMES NOW Ford and for Count I of its Complaint against defendant City states as follows:

17. Plaintiff incorporates by reference paragraphs 1 through 16 of the Complaint as if fully set forth herein.

18. Ford does not engage in the business of "making sales at wholesale" in the City since all sales are made at Ford's assembly plants and parts depots (all of which are outside the City) where ownership, title and possession pass.

19. Ford is entitled to a refund of all taxes, interest and penalties paid to the City both via the assessment and with its returns.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT II - PLACE OF DELIVERY

COMES NOW Ford and for Count II of its Complaint against defendant City states as follows:

20. Plaintiff incorporates by reference paragraphs 1 through 19 of the Complaint as if fully set forth herein.

21. By ordinance, the City is prohibited from imposing its B & O tax based on delivery of Ford's vehicles to dealers located in the City, as SMC 5.45.050(C) provides that the City's tax is imposed "without regard to the place of delivery of articles, commodities, or merchandise sold."

22. Contrary to SMC 5.45.050(C), the City assessed B & O tax against Ford based on Ford's gross receipts from sales of vehicles and parts shipped and delivered to dealers located in the City.

23. Ford is entitled to a refund of all B & O taxes, interest and penalties paid to the City both via the assessment and with its tax returns.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT III - NO GROSS RECEIPTS FROM SEATTLE ACTIVITIES

COMES NOW Ford and for Count III of its Complaint against defendant City states as follows:

24. Plaintiff incorporates by reference paragraphs 1 through 23 of the Complaint as if fully set forth herein.

25. Although Ford does not make "sales at wholesale" within the City as determined by the "inherently local" act of transferring ownership, title or possession to the goods that Ford sells (because Ford conducts those activities at the vehicle assembly plant or parts depots), Ford does engage in some limited activities within the City. Specifically Ford representatives periodically travel into the City

to visit dealerships within the City as set forth in more detail below.

26. Ford representatives make in-person visits to two dealerships located within the City approximately twice per month per dealership. During those periodic visits, Ford representatives ensure that dealers are aware of recent informational bulletins distributed to the dealer electronically, discuss available vehicle allocations, consult regarding dealership performance and occasionally provide training to dealer employees.

27. Ford did not maintain any office or place of business or employ any persons within the City for any of the relevant tax periods in question.

28. SMC 5.45.080(B) provides that a person "engaging in business activities in the City who does not maintain a place of business in the City shall allocate to the City that portion of the taxpayer's gross income or gross proceeds of sales that are derived from business activities performed in the City."

29. Ford does not bill dealerships for, and therefore does not derive gross proceeds from the activities conducted by Ford representatives on the dealerships' premises, which activities are merely customer support activities.

30. Ford is entitled to a refund of all taxes, interest and penalties paid to the City both via the assessment and with its B & O tax returns.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT IV - VOLUME OF SALES TO SEATTLE DEALERS

COMES NOW Ford and for Count IV of its Complaint against defendant City states as follows:

31. Plaintiff incorporates by reference paragraphs 1 through 30 of the Complaint as if fully set forth herein.

32. During its audit of Ford, the City attempted to determine the total gross receipts received by Ford from sales of vehicles and parts to dealerships located in the City.

33. Revenue data provided by Ford to the City included gross receipts from sales to some dealerships whose postal address indicates Seattle, but the dealership is actually outside the City limits.

34. The revenue data provided by Ford also included gross receipts from vehicles manufactured

outside the United States, which sales are not subject to state and local tax pursuant to the Import/Export Clause of the United States Constitution.

35. In the event that the SMC was construed to impose B & O tax on Ford's gross receipts from sales of vehicles to dealers located within the City, the total gross receipts from vehicle and parts sales during the period January 1998 through June 2003 is $337,892,677.

36. The amount of the City wholesaling B & O tax due on the gross receipts identified in the previous paragraph would be $726,469. Ford is entitled to a refund of $646,162 for B & O tax, interest and penalties paid on gross receipts from vehicles and parts sold to dealers outside the City and vehicles manufactured outside the United States and sold before completion of the import journey during the period January 1998 through June 2003.

WHEREFORE, Ford prays this Court enters judgment in Ford's favor and against the City (A) ordering the City to refund to Ford the amount of $646,162 for B & O tax, interest and penalties paid on gross receipts from vehicles and parts sold to dealers outside the City and vehicles manufactured outside the United States and sold before completion of the import journey; (B) interest on all refund amounts from the date of original payment through the date of refund; (C) for an award of its costs and expenses herein, including reasonable attorneys fees; and (D) such other and further relief as the Court deems just and proper.

COUNT V - MULTIPLE ACTIVITIES TAX CREDIT

COMES NOW Ford and for Count V of its Complaint against defendant City states as follows:

37. Plaintiff incorporates by reference paragraphs 1 through 36 of the Complaint as if fully set forth herein.

38. SMC 5.45.070 provides a credit for eligible gross receipts taxes paid to another jurisdiction with respect to the manufacture of products on which the City subsequently imposes its wholesaling B & O tax.

39. During the period January 1998 through December 2002, Ford paid eligible gross receipts taxes in the amount of $19,989 to the city of Hazelwood, Missouri with respect to vehicles produced at Ford's assembly plant there and sold to dealerships located in the City.

40. Ford is entitled to a credit against the City's tax liability in the amount of $19,989 for the eligible gross receipts taxes it paid to Hazelwood, Missouri.

WHEREFORE, Ford prays this Court enters judgment in Ford's favor and against the City (A) ordering the City to refund to Ford the amount of $19,989 for multiple activities tax credits; (B) interest on all refund amounts from the date of original payment through the date of refund; (C) for an award of its costs and expenses herein, including reasonable attorneys fees; and (D) such other and further relief as the Court deems just and proper.

COUNT VI - TAX IN PROPORTION TO SEATTLE ACTIVITIES

COMES NOW Ford and for Count VI of its Complaint against defendant City states as follows:

41. Plaintiff incorporates by reference paragraphs 1 through 40 of the Complaint as if fully set forth herein.

42. At various times, the City has asserted that its B & O tax on the privilege of "making sales at wholesale" is not imposed on a single "inherently local" activity but, rather, is imposed on any business activity conducted within the City related to selling goods at wholesale. Consequently, SMC 5.30.030 and former Seattle Business Tax Rule 5-44-002 identify a number of selling related activities that the City asserts trigger imposition of the City's B & O tax when conducted within the City, including but not limited to: maintaining an office or place of business, maintaining an inventory or stock of goods, solicitation, negotiation, acceptance of orders, credit investigation, credit approval, providing technical assistance with respect to products sold by the person providing assistance, collecting current or delinquent accounts, receiving the purchase price, meeting with customers or prospective customers even when no sales or orders are solicited during the meeting, and passage of title.

43. Many of the selling related activities expressly identified by the City in SMC 5.30.030 and former SBTR 5-44-002 are conducted by Ford exclusively outside the City. Nevertheless, the City has imposed B & O tax on those activities.

44. The limited customer service activities Ford conducts within the City are dwarfed by the substantial activities conducted by Ford outside the City relating to sales to in City dealerships; those outside activities include activities conducted at Ford's regional office in Bellevue (where most dealer communications are handled), at Ford headquarters in Dearborn Michigan (where vehicle allocations are made, incentive programs developed, orders are received and accepted and credit investigation conducted, credit decisions made and the purchase price is received) and Ford's various vehicle assembly plants and parts depots (where inventory is maintained and ownership, title and possession are transferred).

45. In the event that the SMC is construed to impose tax on Ford as a result of Ford's limited customer service activities within the City (notwithstanding the fact that Ford's sales are made outside the City and it derives no gross receipts from its in city customer support activities), SMC 5.45.080(B) limits the City's tax to that portion of Ford's gross receipts attributable to Ford's activities conducted within the City.

46. A fair allocation or apportionment of Ford's gross receipts from sales of vehicles and parts to the City dealers attributable to Ford's activities conducted within the City is eight one hundredths of one percent (0.08%) of the gross proceeds of sales to the City dealers.

47. Tax on 0.08% of Ford's sales to the City dealers during the period January 1998 through June 2003 would be $58,118.

WHEREFORE, Ford prays this Court enters judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford of B & O taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $912,546; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT VII - COMMERCE CLAUSE

COMES NOW Ford and for Count VII of its Complaint against defendant City states as follows:

48. Plaintiff incorporates by reference paragraphs 1 through 47 of the Complaint as if fully set forth herein.

49. Article I, Section 8, Clause 3 (the "Commerce Clause") of the United States Constitution provides that "Congress shall have Power... To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The Commerce Clause protects free trade among the states by restricting the taxing powers of both state and municipal governments.

50. The City may constitutionally tax only that portion of a business's selling activities occurring within the City.

51. The City's B & O tax is not limited to Ford's activities occurring solely within the City, but also imposes the B & O tax on revenue derived from Ford's activities and operations outside the City.

52. The City's B & O Tax unduly burdens interstate commerce by failing to fairly apportion the City's tax to Ford's activities conducted within the City.

53. The B & O Tax reaches beyond that portion of the value that is fairly attributable to Ford's economic activity within the City.

54. The B & O Tax discriminates against commercial activity occurring outside of the City and Washington and, therefore, interstate commerce, which violates the Commerce Clause on its face.

55. The B & O Tax is not reasonably or "fairly related to the services provided" by the City to Ford, as required by the Commerce Clause.

56. The City may constitutionally tax only that portion of Ford's activities that occur within the City, and therefore, any attempt by the City to impose the tax on any part of Ford's gross receipts beyond those corresponding to Ford's operations that take place within the City discriminates against interstate commerce and is unconstitutional as applied to Ford.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O Taxes, interest and penalties paid on October 15,

2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O Taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT VIII - EQUAL PROTECTION

COMES NOW Ford and for Count VIII of its Complaint against defendant City states as follows:

57. Plaintiff incorporates by reference paragraphs 1 through 56 of the Complaint as if fully set forth herein.

58. Article I, Section 12 of the Washington Constitution mandates "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

59. The Fourteenth Amendment, Section 1, to the United States Constitution prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."

60. The B & O Tax is violative of the equal protection clause of Article I, Section 12 of the Washington Constitution and the equal protection clause of the Fourteenth Amendment, Section 1, to the United States Constitution, in that the B & O

Tax results in an undue tax burden on businesses with multiple operations located outside the City compared to the tax burden on businesses with operations solely within the City.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O Taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O Taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT IX - DUE PROCESS

COMES NOW Ford and for Count IX of its Complaint against defendant City states as follows:

61. Plaintiff incorporates by reference paragraphs 1 through 60 of the Complaint as if fully set forth herein.

62. Article I, Section 3 of the Washington Constitution provides that "no person shall be deprived of ... property, without due process of law."

63. The Fourteenth Amendment, Section 1, to the United States Constitution provides that a state may not "deprive any persons of ... property without due process of law."

64. The B & O Tax is not reasonably related to Ford's activities within the City, as required by the Due Process Clause of the United States Constitution or the Due Process Clause of the Washington Constitution.

65. The SMC, on its face and as applied, creates an unreasonable, arbitrary and discriminatory classification without reasonable justification and, therefore, deprives Ford of its property without due process in violation of the Washington and United States constitutions.

WHEREFORE, Ford prays this Court enter judgment in Ford's favor and against the City (A) ordering the City to refund to Ford all B & O Taxes, interest and penalties paid on October 15, 2003 in the amount of $401,968.00; (B) ordering the City to refund to Ford all B & O Taxes paid with Ford's tax returns for the period January 1998 through June 2003 in the amount of $970,663.68; (C) interest on all refund amounts from the date of original payment through the date of refund; (D) for an award of its costs and expenses herein, including reasonable attorneys fees; and (E) such other and further relief as the Court deems just and proper.

COUNT X - DECLARATORY JUDGMENT

COMES NOW Ford and for Count X of its Complaint against defendant City states as follows:

66. Plaintiff incorporates by reference paragraphs 1 through 65 of the Complaint as if fully set forth herein.

67. A present, justiciable controversy exists as to whether the B & O tax is capable of enforcement on its face or as applied by the City against Ford under the above-cited City ordinances, Washington statutes or United States Constitution at present and in the future.

WHEREFORE, Ford prays this Court enter a declaratory judgment in Ford's favor and against the City finding that

(A) Ford does not engage within the City in the business of making sales at wholesale;

(B) Although Ford engages in business activities in the City, it does not maintain a place of business in the City, has no gross income and derives no gross proceeds of sales from business activities within the City, and therefore is not required to allocate to the City any portion of its gross income or gross proceeds of sales under SMC 5.45.080(B);

(C) In the alternative to (B), Ford is entitled to apportion the City's tax based on the proportion of its limited customer service activities conducted within the City to activities conducted outside the City; and

Such other and further relief as the Court deems just and proper.

DATED: December 16, 2004.

PERKINS COIE LLP

By: _____

Scott Edwards; WSBA #26455
Attorneys for Plaintiff
Ford Motor Company

APPENDIX G

The Honorable Frederick W. Fleming

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

FORD MOTOR COMPANY, Plaintiff, v. CITY OF TACOMA Defendant.	NO. 04-2-08497-6 FIRST AMENDED COMPLAINT FOR REFUND OF TAXES PAID

COMES NOW Plaintiff, Ford Motor Company ("Ford"), and for its complaint against Defendant, City of Tacoma ("Tacoma" or "City"), states as follows:

NATURE OF ACTION

This is a declaratory judgment and refund action challenging the legality of Tacoma's assessment of municipal business and occupation tax against Ford Motor Company. The City's effort to assess tax on Ford's sales to dealers located within the City is both contrary to the Tacoma Municipal Code and unconstitutional.

JURISDICTION

1. This Court has jurisdiction pursuant to the Uniform Declaratory Judgments Act, RCW 7.24.010, and pursuant to the Washington Constitution, Article IV, Section 6 and RCW 2.08.010, which vest the Superior Court with original jurisdiction over all cases involving "the legality of any tax, impost, assessment, toll or municipal fine."

PARTIES

2. Plaintiff Ford is a corporation organized, existing and in good standing under the laws of the State of Delaware, and is registered to do business pursuant to the laws of the State of Washington.

3. Defendant, Tacoma, is a city organized and existing under the laws of the State of Washington.

FACTS

4. During the years applicable to this suit, automobile dealers located throughout the United States (including several located in the City) purchased vehicles (and related parts) from Ford at Ford's assembly plants (and parts depots) located outside the State of Washington.

5. The Tacoma Municipal Code ("TMC") imposes an excise tax ("B & O tax") on "the act or

privilege of engaging in business activities within the City," and provides that the amount of tax is determined by multiplying the taxpayer's gross receipts by the applicable tax rate. The TMC provides that "making sales at wholesale" within Tacoma is a taxable business activity.

6. Under the TMC, the measure of tax for persons engaged in the business of making sales at wholesale within Tacoma is the "gross proceeds of sales." Regardless of where related activities may occur, all sales of Ford vehicles are made by the company at its assembly plants, none of which are located in Tacoma (or even within Washington).

7. TMC 6.68.050 defines a "sale" as the "transfer of the ownership of, title to, or possession of, property for a valuable consideration."

8. Ford transfers ownership, title and possession of all vehicles it sells to dealers at Ford's vehicle assembly plants. Ford transfers ownership, title and possession of the parts it sells to dealers at Ford's parts depots.

9. There are no Ford vehicle assembly plants or parts depots located within the City. All of Ford's vehicle assembly plants and parts depots are located outside the city (and outside Washington).

10. All sales of Ford vehicles (and related parts) are made by the company at is assembly plants and parts depots, none of which are located in the City.

11. For the period January 2000 through June 2004 Ford paid Tacoma B & O tax with its regularly filed returns in the total amount of $202,725.17.

12. On or about April 21, 2004, Tacoma's Tax and License Division mailed to Ford two unsigned documents labeled "Field Auditor's Reports." They reflected additional tax, interest and penalties for periods from January 1, 1990 through December 31, 2002 totaling $1,307,933.83. Those unexecuted Field Auditor's Reports were not accompanied by any Notice of Assessment.

13. Tacoma has orally advised Ford that the Field Auditor's Reports should be considered formal tax assessments.

14. Tacoma has adopted an ordinance that says the exclusive procedure for contesting the validity of a Tacoma tax assessment is to pay the assessment and file an appeal with the City Clerk (to obtain an administrative hearing before the City of Tacoma Hearing Examiner).

15. TMC 6.01.140 and 6.01.150 invalidly purport to limit a taxpayer's rights under Washington Constitution, Article IV, Section 6 and RCW 2.08.010 to invoke the Superior Court's original jurisdiction to hear cases involving the legality of a tax or assessment.

16. A municipality, like Tacoma, has no authority to prescribe or restrict jurisdiction, practice and procedure in Superior Court. *Mary*

Kay, Inc. v. Tacoma, Wn. App. 111, 117, 70 P3d 146 (2003) (dismissing tax case filed pursuant to Tacoma Municipal Code); *City of Spokane v. J-R Distrib., Inc.*, 90 Wn.2d 722, 726-27, 585 P.2d 784 (1978) (municipality cannot prescribe to the superior court the practices and procedures the municipality expects the superior court to follow).

17. Out of an abundance of caution, on May 12, 2004, in accordance with the procedures asserted by Tacoma in TMC 6.01.140 and 6.01.150, Ford paid the disputed assessments in full ($1,307,933.83) and filed a Notice of Appeal with the Tacoma City Clerk.

18. By stipulation of the parties the administrative appeal has been stayed pending the resolution of this case.

COUNT I

19. Ford incorporates by reference paragraphs 1 through 18 of the Complaint as if fully set forth herein.

20. Ford does not engage in the business of "making sales at wholesale" in the City since all sales are made at Ford's assembly plants and parts depots (all of which are outside the City) where ownership, title, and possession pass.

21. Ford is entitled to a refund of all taxes, interest and penalties paid to the City both via the assessment and with its returns.

COUNT II

22. Ford incorporates by reference paragraphs 1 through 21 of the Complaint as if fully set forth herein.

23. By ordinance, the City is prohibited from imposing its B & O tax based on delivery of Ford's vehicles to dealers located in the City, as TMC 6.68.050(1)(c) provides that the City's tax is imposed "without regard to the place of delivery of articles, commodities, or merchandise sold."

24. Contrary to TMC 6.68.050(1)(c), the City assessed tax against Ford based on Ford's gross receipts from sales of vehicles and parts shipped and delivered to dealers located in the City.

25. Ford is entitled to a refund of all taxes, interest and penalties paid to the City both via the assessment and with its returns.

COUNT III

26. Ford incorporates by reference paragraphs 1 through 25 of the Complaint as if fully set forth herein.

27. Although Ford does not make "sales at wholesale" within the City as determined by the inherently local act of transferring ownership, title or possession to the goods Ford sells (because Ford conducts those activities at the vehicle assembly plant or parts depots), Ford does engage in some limited activities within the City. Specifically Ford

representatives periodically travel into the City to visit dealerships within the City as set forth in more detail below.

28. Ford representatives' in-person visits to local dealerships are conducted approximately twice per month per dealership. During those periodic visits, Ford representative ensure that dealers are aware of recent informational bulletins distributed to the dealer electronically, discuss available vehicle allocations, consult regarding dealership performance and occasionally provide training to dealer employees.

29. Ford did not maintain any office or place of business or employ any persons within the City for any of the relevant tax periods in question.

30. Tacoma's B & O tax only applies to gross income or gross proceeds of sales that are derived from business activities performed in the City.

31. Ford does not bill dealers for, and therefore does not derive gross income or gross proceeds from, the activities conducted by Ford representatives on the dealers' premises, which activities are merely customer support activities.

32. Ford is entitled to a refund of all taxes, interest and penalties paid to the City both via the assessment and with its returns.

COUNT IV

33. Ford incorporates by reference paragraphs 1 through 32 of the Complaint as if fully set forth herein.

34. During its audit of Ford, the City attempted to determine the total gross receipts received by Ford from sales of vehicles and parts to dealers located in the City.

35. The Assessments used estimated figures for Ford vehicle unit sales to dealerships located in Tacoma for the years 2000, 2001 and 2002. Those estimated figures overstate the actual unit sales to dealerships located in Tacoma for the period 2000 through 2002.

36. Even in the event that the TMC was construed to impose tax on Ford's gross receipts from sales of vehicles and parts to dealerships located within the City, Ford is entitled to a refund of tax, interest and penalties assessed and paid on amounts in excess of actual gross receipts from vehicles sold to dealerships located in Tacoma for the period 2000 through 2002.

COUNT V

37. Ford incorporates by reference paragraphs 1 though 36 of the Complaint as if fully set forth herein.

38. TMC 6.68.070 provides a credit for eligible gross receipts taxes with respect to the

manufacture of products on which the City subsequently imposes its wholesaling B & O tax.

39. Ford paid eligible gross receipts taxes to the city of Hazelwood, Missouri with respect to vehicles produced at Ford's assembly plant there and sold to dealer located in the City.

40. Ford is entitled to a credit against any City tax liability for the eligible gross receipts taxes it paid to Hazelwood, Missouri.

COUNT VI

41. Ford incorporates by reference paragraphs 1 through 40 of the Complaint as if fully set forth herein.

42. The TMC limits the "gross income of the business" to the value proceeding or accruing from the business activities engaged in, including compensation for rendition of services.

43. The assessments include in the measure of service B & O tax, amounts identified in the Field Auditor's reports as "advertisement."

44. These amounts are not compensation for services rendered or any other form of gross income. Ford does not provide any advertising services to dealers. The "advertisement" amounts reflect sums pooled by dealerships to purchase local and regional advertising.

45. Tacoma's assessments are erroneous and Ford is entitled to a refund of all amounts (tax, interest and penalties) assessed on "advertisement" monies.

COUNT VII

46. Ford incorporates by reference paragraphs 1 through 45 of the Complaint as if fully set forth herein.

47. The assessment also impose service B & O tax against Ford for revenue from extended warranties.

48. Ford does not provide extended warranties; extended warranties are provided by a different company.

49. Tacoma's assessment are erroneous and Ford is entitled to a refund of all amounts (tax, interest and penalties) assessed on extended warranty revenue.

COUNT VIII

50. Ford incorporates by reference paragraphs 1 through 49 of the Complaint as if fully set forth herein.

51. Ford is registered with the City of Tacoma.

52. The TMC prohibits the City from assessing municipal B & O tax against registered

taxpayers for periods more than four years prior to the current year. Thus, the limitations period has run for Tacoma to assess tax against Ford for the periods 1994 through 1999, even if tax were otherwise properly due.

53. Tacoma's assessments are erroneous and Ford is entitled to a refund of all amounts assessed (tax, interest and penalties) for the period 1994 through 1999 as barred by the applicable limitations period.

COUNT IX

54. Ford incorporates by reference paragraphs 1 through 53 of the Complaint as if fully set forth herein.

55. Upon information and belief, the City asserts that its B & O tax on the privilege of "making sales at wholesale" is not imposed on a single inherently local activity but, rather, is imposed on any business activity conducted within the City related to selling related goods at wholesale. Consequently, TMC 6.68.030 identifies a number of selling related activities that the City asserts trigger imposition of the City's B & O tax when conducted within the City, including but not limited to: maintaining an office of place of business, maintaining an inventory or stock of goods, solicitation, negotiation, acceptance of orders, credit investigation, credit approval, providing technical assistance with respect to products sold by the person providing assistance, collecting current or delinquent accounts, receiving the purchase price,

meeting with customers or prospective customers even when no sales or orders are solicited during the meeting, and passage of title.

56. Many of the selling related activities expressly identified by the City in TMC 6.68.030 are conducted by Ford exclusively outside the City. Nevertheless the City has imposed B & O tax on those activities.

57. The limited customer service activities Ford conducts within the City are dwarfed by the substantial activities conducted by Ford outside the City relating to sales to in City dealerships; those outside activities include activities conducted at Ford's regional office in Bellevue (where most dealer communications are handled), at Ford headquarters in Dearborn Michigan (where vehicle allocations are made, incentive programs developed, orders are received and accepted and credit investigation conducted, credit decisions made and the purchase price is received) and Ford's various vehicle assembly plants and parts depots (where inventory is maintained and ownership, title and possession are transferred).

58. In the event that the TMC is construed to impose tax on Ford as a result of Ford's limited customer service activities within the City (notwithstanding the fact that Ford's sales are made outside the City and it derives no gross receipts from its in city customer support activities), the City's tax is limited to that portion of Ford's gross receipts attributable to Ford's activities conducted within the City.

59. A fair allocation or apportionment of Ford's gross receipts from sales of vehicles and parts to the City dealers attributable to Ford's activities conducted within the City is 0.08% of the gross proceeds of sales to the City dealers. Ford is entitled to a refund for tax, interest and penalties paid on gross receipts from vehicles and parts sold in excess of receipts fairly apportioned to the City.

COUNT X

60. Ford incorporates by reference paragraphs 1 through 59 of the Complaint as if fully set forth herein.

61. Article I, Section 8, Clause 3 (the "Commerce Clause") of the United States Constitution provides that "Congress shall have Power ... To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The Commerce Clause protects free trade among the states by restricting the taxing powers of state and local governments.

62. The City may constitutionally tax only that portion of a business's selling activities occurring within the City.

63. As written, the City's tax code seeks to tax the entire "gross proceeds of sales" including the "value proceeding or accruing" from the sale of tangible personal property, i.e. the amount of the sale at wholesale for each and every one of the vehicles manufactured, assembled and sold at Ford

locations throughout the country and world-wide, if the purchaser's (dealer's) business was located in Tacoma.

64. Tacoma's assessments impose tax on gross proceeds derived from Ford's activities and operations outside the City.

65. The assessments reach beyond that portion of the value that is fairly attributable to Ford's economic activity within Tacoma.

66. The City's B & O tax unduly burdens interstate commerce by failing to fairly apportion the City's tax.

67. Tacoma's assessments result in successive taxation of Ford's interstate activities and the gross receipts derived therefrom.

68. The City's B & O tax discriminates against interstate commerce.

69. The City's B & O tax is not reasonably or "fairly related to the services provided" by the City to Ford.

70. The City may constitutionally tax only that portion of Ford's activities that occur within the City, and therefore, any attempt by Tacoma to impose the tax on any part of Ford's gross receipts beyond those corresponding to Ford's activities that take place within the City, is not fairly apportioned, discriminates against interstate commerce and is unconstitutional as applied to Ford.

COUNT XI

71. Ford incorporates by reference paragraphs 1 through 70 of the Complaint as if fully set forth herein.

72. Article I, Section 12 of the Washington Constitution mandates "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

73. The Fourteenth Amendment, Section 1, to the United States Constitution prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."

74. The City's B & O tax and the assessments violate the equal protection clause of Article I, Section 12 of the Washington Constitution and the equal protection clause of the Fourteenth Amendment, Section 1, to the United States Constitution, in that they result in an undue tax burden on businesses with multiple operations located outside Tacoma, compared to the tax burden on businesses with operations located solely within Tacoma.

COUNT XII

75. Ford incorporates by reference paragraphs 1 though 74 of the Complaint as if fully set forth herein.

76. Article I, Section 3 of the Washington Constitution provides that "no person shall be deprived of . . . property, without due process of law."

77. The Fourteenth Amendment, Section 1, to the United States Constitution provides that a state may not "deprive any persons of . . . property without due process of law."

78. The City's B & O tax and the assessments are not reasonably related to Ford's activities within the City of Tacoma, as required by the Due Process Clause of the United States Constitution or the Due Process Clause of the Washington Constitution.

79. The TMC, on its face and as applied, creates an unreasonable, arbitrary and discriminatory classification without reasonable justification and, therefore, deprives Ford of its property without due process in violation of the Washington and United States constitutions.

PRAYER FOR RELIEF

WHEREFORE, Ford prays that this Court:

1. Enter a declaratory judgment for Ford and against Tacoma finding that:

(a) Ford does not engage within the City in the business of making sales at wholesale, and

(b) Ford is not required to allocate any portion of its gross proceeds of sales or gross income of the business to the City; or

(c) In the alternative to (b), Ford is entitled to apportion City tax based on the proportion of its limited customer service activities conducted within the City to the selling activities it conducts outside the City.

2. Enter a judgment in favor of Ford and against Tacoma for refund of all tax, interest and penalties paid by Ford pursuant to the assessments together with taxes overpaid with Ford's returns in the total amount of $1,510,659.00 or such other amount to be proved at trial, plus prejudgment and post judgment interest as provided by law;

3. Award Ford its costs, including reasonable attorneys fees; and

4. Grant such further relief as the Court deems just and proper.

DATED: December 16, 2004.

PERKINS COIE LLP

By: _____
Scott M. Edwards, WSBA #26455
Attorneys for Plaintiff
Ford Motor Company

APPENDIX H

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

FORD MOTOR COMPANY, Plaintiff, v. CITY OF TACOMA, Defendant.	NO. 04-2-08497-6 STIPULATION OF FACTS

STIPULATION

It is hereby stipulated by and between the parties for the purpose of this case that the following facts may be considered true and correct for all periods at issue, subject to the right of either party to object to such facts on the grounds of materiality or relevance and subject to the right of either party to introduce further evidence not inconsistent herewith.

Facts

1. Ford Motor Company ("Ford") manufactures vehicles and parts, which it sells at wholesale, to independent Ford and Lincoln-Mercury dealerships.

2. Ford conducts business activities in Tacoma.

3. Ford has nexus with Tacoma for B & O tax purposes.

4. The period at issue in this case is January 1990 through December 2002 (hereinafter "the audit period").

5. During the audit period, there were two Ford dealers in Tacoma, Titus-Will Ford and Mallon Ford. These dealers purchased vehicles and parts at wholesale from Ford during that period.

6. During the years 1990 to 1993, Ford had a partial ownership interest in Mallon Ford.

7. In or about September 2001, the owners of Titus-Will Ford purchased Mallon Ford.

8. During the period January 1990 through June 2000, there was one Lincoln-Mercury dealer in Tacoma, Bill Gill Lincoln-Mercury. Bill Gill Lincoln-Mercury ceased operations as a Lincoln-Mercury dealer in approximately June 2000. This dealer purchased vehicles and parts at wholesale from Ford during that period.

9. In December 1999, Tacoma Senior Auditor Jerry Wheeler wrote to Ford concerning the need to register and about the City's intent to audit Ford.

10. In January 2000, Mr. Wheeler again wrote to Ford about registration and audit.

11. In March 2000, Ford registered with Tacoma and paid annual business license fees and late

penalties for each of the years 1994 through 2000 in the total amount of $720.

12. In December 2000, Tacoma issued a jeopardy assessment to Ford for the years 1990 and 1991.

13. For the period January 2000 through June 2004, Ford paid Tacoma B & O tax with its regularly filed returns in the total amount of $190,800.16.

14. Tacoma assessed B & O tax against Ford for the audit period under the wholesale classification.

15. On or about April 21, 2004, Tacoma's Tax and License Division mailed Ford two unsigned documents labeled "Field Auditor's Reports." The reports reflect additional tax, interest and penalties for the period January 1, 1990 through December 31, 2002 totaling $1,307,933.83.

16. Tacoma verbally advised Ford that the Field Auditor's Reports should be considered tax assessments.

17. Issues with the City's new computer system prevented automated production of a formal Notice of Assessment.

18. On or about May 12, 2004, Ford paid the amount indicated on the Field Auditor's Reports and commenced this lawsuit.

19. Tacoma's calculation of tax for the years 2000 through 2002 was based on estimated figures.

20. Some vehicles purchased by Tacoma dealers were assembled at Ford's Saint Louis Assembly Plant ("SLAP"), which is physically located in Hazelwood, Missouri.

21. Ford paid gross receipts taxes to the City of Hazelwood for its manufacturing activities.

22. Under Tacoma's B & O tax scheme, Ford is entitled to a deduction from the measure of Tacoma B & O tax for gross receipts used in the measure of Ford's Hazelwood gross receipts tax on vehicles manufactured in Hazelwood and ultimately sold at wholesale to dealers located in Tacoma.

23. For purposes of the audit at issue herein, the parties stipulate that the measure of Ford's tax with respect to gross income or gross proceeds of sale from vehicle parts may be calculated as 16.5% of the measure of tax with respect to gross income or gross proceeds of sale from vehicles.

24. The design and development of new and improved vehicles and vehicle features is an important driver of new vehicle sales for Ford.

25. Ford employs more than 300 people in its research, development, testing, engineering and design facilities, all of which are located outside Tacoma.

26. All of Ford's vehicle assembly plants are located outside of Washington.

27. All of Ford's parts depots are located outside of Washington.

28. Ford has a Northwest Region Office located in Bellevue, Washington.

29. Ford employs approximately 30 at its Northwest Region Office.

30. The Northwest Region for Ford is responsible for approximately 145 Ford and Lincoln-Mercury dealerships located in the states of Alaska, Washington, Oregon, Idaho and Montana, as well as the northernmost part of California.

31. Ford's new vehicles are sold at retail exclusively through independent Ford and Lincoln-Mercury dealers. The relationship between Ford and the dealers is governed by the terms of Ford's Sales and Service Agreement.

32. Ford supplements its Sales and Service Agreements with its dealers using Terms of Vehicle Sale Bulletins. Bulletins Nos. 9 and 10 were issued during the audit period.

33. Dealers purchase and receive vehicles through processes established by Ford. Ford refers to these processes as the "Order Flow Process."

34. Ford's Order Flow Process consists of eight processes: Program, Allocation, Wholesale, Scheduling, Segmenting, Sequencing/Blending, Build, and Logistics. These eight processes are conducted partly in Michigan, partly in the

individual manufacturing and assembly plant locations throughout the U.S., partly in the Bellevue, Washington Northwest Region office and partly in Tacoma.

35. Ford's order flow process applies equally to its Ford Division and Lincoln-Mercury Division.

36. The Program element of Ford's Order Flow Process, which is conducted in Michigan, consists of determining rolling, 11-month forecast of U.S. car and truck industry sales. This rolling forecast is used to determine a forecast of vehicle line sales and production requirements as well as commodities (tires, engines types, car stereos, etc.) allocation projections.

37. The outputs of the Program process are used to determine the allocations of vehicles to specific dealers.

38. During the Allocation element of Ford's process, which occurs in Michigan, Ford determines the number of vehicles, by vehicle line, that will be offered to each region office and individual dealers in the upcoming production period, based on the national forecast, the sales history of the region and individual dealers as well as upcoming marketing programs.

39. During Allocation, Ford also reviews plant capacity, makes provisions for reserve requirements (e.g. fleet sales, government sales, etc.) and determines commodity restrictions and their

equitable distribution among individual regions based on sales, stock, and availability data.

40. The final output of the Allocation process consists of Earned Allocation reports, which list the amounts and types of vehicles allocated to each region and dealer throughout the U.S.

41. The Earned Allocation reports are forwarded to Ford's regional offices, including the Northwest Region office in Bellevue.

42. Approximately 150 Ford employees in Dearborn, Michigan, are involved in Program and Allocation processes.

43. Upon receipt of the Earned Allocation report, the Ford Northwest Region office's entire staff conducts a two-day meeting at its Bellevue office. This meeting is considered the first step in the Wholesale element of Ford's Process.

44. At the Region Meeting, region staff reviews the Allocation, discusses current market conditions, near future market conditions, and strategies on how to persuade dealers to commit to the allocation.

45. After the Region Meeting, the District Manager works with the Zone Managers to develop individualized plans for presenting the Allocation to each dealer.

46. Based on the Earned Allocation report and the strategy developed during and after the Region Meeting, the Zone Manager prepares a commitment

form for the dealer to sign at Dealer Commitment meetings.

47. During Dealer Commitment meetings, which occurred approximately 10 times per year per dealer and lasted approximately 1 ½ hours per meeting per dealer during the audit period, a Zone Manager for either Ford or Lincoln-Mercury met with the dealers in Tacoma, presented the commitment form, and the dealer committed to order a specific number of vehicles, by vehicle line, to be manufactured during the next production cycle.

48. Since late 2001, when Titus-Will and Mallon Ford came under common ownership, there is a single commitment meeting for both dealerships, which is conducted at Titus-Will Ford in Tacoma.

49. The dealer may commit to order all or only a portion of the production allocated to it.

50. The dealer may also request a supplemental order for vehicles in excess of its allocation, which is also noted on the commitment form during the Dealer Commitment meeting.

51. Both the dealer and the Zone Manager sign the completed commitment form at the Dealer Commitment meeting.

52. The signed Dealer Commitment is taken back to the Northwest Region Office and the commitment information is forwarded to Ford headquarters in Dearborn, Michigan.

53. After the Dealer Commitment meetings, to the extent that a dealer committed to less than its full allocation, the Zone Manager attempts to identify other dealers willing to order the uncommitted allocation and also attempts to identify uncommitted allocations of other dealers that could be used to satisfy dealer demand for supplemental orders.

54. These post-Dealer Commitment activities occur at the Northwest Region office in Bellevue.

55. In addition to Dealer Commitment meetings, the Zone Manager also visited the dealerships in Tacoma on an approximately monthly basis to provide business consultation and guidance.

56. Once the Dealer Commitment is "accepted," at Ford headquarters dealers may electronically order against the commitment. This occurs as part of the Scheduling element of Ford's Process.

57. The Scheduling element begins in Michigan where, based on the Dealer's Commitment, together with factors such as fast turning units, and dealer sales history, preferences and inventories, Ford creates a "Suggested Retail Order ("SRO")" for each week of the production cycle. The production period varies from 4 to 10 weeks.

59. Ford inputs or uploads the SRO into its ordering and tracking system. Dealers may either accept or modify the SRO.

59. Each SRO addresses numerous variants that are available with each vehicle and include such items as colors, body style, engine size and optional equipment.

60. Dealers interface with the ordering and tracking system via computer to place orders, referred to as a Dealer Generated Order, against their earlier commitment. A dealer may create an order that is unrelated to an SRO. If the dealer takes no action, eventually the SRO is converted to an order.

61. Dealers are able to electronically track against their orders and their Commitment via computer from scheduling, through the manufacturing process, through delivery to the carrier and through the logistics process for the production period covered by the commitment.

62. A Planning and Distribution Manager, located at the region office, reviews all Dealer Generated Orders to confirm that the vehicle specifications called for reflect a "buildable" vehicle.

63. If a dealer orders a vehicle that is not buildable, the Planning and Distribution Manager or the Distribution Analyst will contact the dealer either by telephone or e-mail to advise the dealer of the problem with the order and request that the dealer revise its order.

64. A Distribution Analyst, who reports to the Planning and Distribution Manager, monitors orders

placed by dealers are timely placing orders consistent with their commitments.

65. On the rare occasions when a dealer does not timely place an order per its commitment, the dealership may receive a telephone call or e-mail reminder. These actions are performed either at the regional office in Bellevue or at Ford's headquarters in Dearborn, Michigan.

66. The Scheduling process ends when orders are entered into the computerized ordering and tracking system.

67. During Segmenting, Ford's Michigan personnel assign vehicle orders to an assembly plant based on transportation costs to the dealer and plant capacity. A serial number is assigned to each vehicle ordered as well as a "build week."

68. Ford employs approximately 350 personnel in Michigan who have overall responsibility for ordering commodities/parts from outside suppliers, including the commodities/parts for Ford's four engine plants, three transmission plants, four casting plants, seven stamping plants, and 18 assembly plants located in the United States.

69. Once the parts are ordered, the Sequencing process begins by sequencing the dealer orders in such a manner as to move it from order status to the point in which assembly of the ordered vehicle will begin.

70. Due to the number of parts that go into any one vehicle, the Sequencing process, in part, monitors the arrival of all commodities and sequences them in such a manner as to build the specified vehicle at a specified time, moving that time from a build week to a specific day, which is then blending into the "build" lineup for assembly.

71. The Build process begins when all the parts needed to build a specific vehicle arrived at the plant and the vehicle is scheduled for production.

72. Once scheduled the assembly plants weld and bolt the various component parts together creating a finished vehicle.

73. The actual assembly of a vehicle at a production facility takes approximately one day.

74. Ford's vehicle Logistics process involves the transportation of vehicles from Ford's assembly plants to the dealers.

75. Generally, with minor variations between each facility's processes, once final testing is completed, assembled vehicles are placed in a designated holding area ("drop zone") where a third party carrier inspects each vehicle.

76. Once inspection is complete, the third party carrier's personnel drive the vehicles out of the drop zone.

77. At the drop zone exit, a bar code scanner reader records and releases the vehicle ("Gate Release").

78. At Gate Release, Ford invoices the dealers and transfers title to the dealer. Ford retains a security interest in the vehicle until payment is made.

79. After Gate Release, the carrier hauls the vehicle to a Rail Ramp where it is placed on a train for shipment to a mixing center or directly to a destination ramp.

80. The mixing centers serve as consolidation points for vehicles from of the assembly plants.

81. The carrier sorts the vehicles by destination and loads them onto trains for shipment to their respective destination ramps.

82. The destination ramp for vehicles purchased by Tacoma dealers is located in Kent, Washington.

83. At the destination ramp, the carrier offloads the trains and loads the vehicles onto trucks for transport to the destination dealership.

84. When the vehicles arrive at a dealership, an employee of the dealer inspects the vehicles and then signs a bill of lading, acknowledging receipt of the vehicles.

85. Beginning March 1, 2001, an insurance policy, purchased by Ford on behalf of the dealers, covered risk of loss in transit. The insurance policy names

the dealer as the insured and Ford as the agent for the insured.

86. Repair of defects or in-transit damage not covered by insurance is handled as a warranty claim as address in Ford's Warranty and Policy Manual.

87. Ford's activities and involvement with dealerships includes marketing and customer satisfaction assistance.

88. Ford's Market Representation Manager, whose responsibilities include managing the dealer Sales and Service Agreements for all Ford and Lincoln-Mercury dealers within the region, most recently visited Titus-Will Ford in Tacoma in 2004, at which time Ford presented to the dealership a market study the company commissioned of the Tacoma metropolitan area.

89. Ford attempts to conduct such studies for major markets approximately every two to three years.

90. The Market Representation Manager typically visits the Titus-Will Ford and Mallon Ford dealerships in Tacoma once a year or less.

91. A Regional Manager has overall responsibility for Lincoln and Mercury dealers within the Northwest Region. The Region Manager's work is mostly performed at the regional office in Bellevue.

92. Ford's Customer Service Division personnel are responsible for consulting with dealers on issues

regarding parts and service, as well as monitoring dealer warranty claims experience, customer satisfaction with dealer parts and service departments, and growth of dealer parts and service operations.

93. During the audit period and continuing to the present, the Customer Service Zone Manager visited the Tacoma dealerships as frequently as weekly and at least once a month for parts issues, customer satisfaction issues, damaged freight issues, and Ford incentives and programs.

94. During the audit period and continuing to the present, Ford provided a warranty on all of its new vehicles.

95. During the audit period and continuing to the present, the Tacoma dealerships performed warranty work pursuant to the Sales and Service Agreements and Warranty and Policy Manual, and Ford reimbursed the dealerships for such work, including parts and labor costs.

96. Customer Service Division Field Service Engineers travel to Tacoma dealerships approximately once per year to provide in-person advice on repair and service issues.

97. During the audit period and continuing to the present, Ford generates a Certificate of Origin for a Vehicle ("COV") for newly manufactured vehicles and invoices the dealer when a vehicle is "bucked" (when all the parts for a specific vehicle have arrived at the plant and the vehicle's assembly is imminent,

generally the same day that the vehicle is assembled).

98 The invoice and COV are mailed to the dealer from Troy, Michigan.

99. For the audit period occurring before November 13, 2000, Ford's Sales and Service Agreements called for payment of the invoice at gate release.

100. For periods on and after November 13, 2000, the terms of payment were revised to provide for payment of invoices upon arrival of the vehicle at the dealership, however, the dealer's floor plan line of credit may actually be drafted a few days either before or after the vehicle arrives at the dealership.

101. Ford obtained payment by drafting against the dealer's floor plan line of credit (the dealers authorize Ford to debit their floor plan credit lines to pay vehicle invoices).

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